TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted] 132

BALTIMORE & OHIO RAILROAD COMPANY AND BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONERS,

vs.

J. G. LEACH.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

PETITION FOR CERTIORARI FILED FEBRUARY 12, 1917.
CERTIORARI AND RETURN FILED MAY 14, 1917.

(25,768)

(25,768)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 938.

BALTIMORE & OHIO RAILROAD COMPANY AND BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONERS.

vs.

J. G. LEACH.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 COMMONWEALTH OF KENTUCKY:

The Court of Appeals of Kentucky.

BALTIMORE & OHIO RAILROAD COMPANY, Appellant,

VS.

J. G. LEACH, Appellee.

Appeal from the Scott Circuit Court.

Be it remembered that heretofore to-wit, on the 11th day of November, 1915, the appellant by attorney filed in the Office of the Clerk of the Court of Appeals a transcript of the record, which was endorsed as follows:

1915, Nov'r 11th, filed, Tax Paid. Appeal prayed.

One Volume of Evidence filed; Motion for an appeal filed by appellant, Summons and Copy issued to Scott County. R. L. Greene, C. C. A.

1915, Dec'r 4th, Supersedeas Bond executed, Supersedeas and Copy issued.

The Motion for an appeal, Supersedeas Bond record are in words and figures as follows:

2 Kentucky Court of Appeals.

BALTIMORE & OHIO RAILROAD COMPANY and BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant,

VS.

J. G. LEACH, Appellee.

Motion.

Comes the appellant the Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern R. R. Co. and says that it desires to prosecute and appeal from a judgment that the Scott Circuit Court rendered against it at the May term 1915, in favor of the appellee, J. G. Leach for the sum of three hundred and seventy two ($372.00) and it hereby moves this court to grant it an appeal herein and it asks that summons be issued for the appellee J. G. Leach.

(Signed) BALTIMORE & OHIO RAILROAD COMPANY,
By GIBSON & CRAWFORD.

[Endorsed:] Kentucky Court of Appeals. Baltimore & Ohio Railroad Company, Appellant, vs. J. G. Leach, Appellee. Motion for Appeal. Filed Nov. 11, 1915. Robert L. Greene.

1—938

3 Kentucky Court of Appeals.

BALTIMORE & OHIO RAILROAD and BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Statement.

The name of the appellant is the Baltimore and Ohio Railroad Company.

The name of the appellee is J. G. Leach.

The judgment herein appealed from was rendered on the 4" day of June, 1915, which was during the May term of the Scott Circuit Court and said judgment is found on pages 30 and 31 of the Clerk's copy of records.

No summons but warning order is desired.

The address of the appellee is Georgetown, Kentucky, and the address and the name of the appellee's counsel is B. M. Lee whose address is also Georgetown, Kentucky.

BALTIMORE & OHIO RAILROAD COMPANY,
By J. CRAIG BRADLEY,
GIBSON & CRAWFORD.

[Endorsed:] Kentucky Court of Appeals. Baltimore & Ohio Railroad Company, Appellant, vs. J. G. Leach, Appellee.

4 Court of Appeals of Kentucky.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant,

against

J. G. LEACH, Appellee.

Supersedeas Bond.

Whereas, said appellant has prayed an appeal from a judgment of the Scott Circuit Court, rendered June 4, 1915, against it in favor of the appellee for Three hundred and seventy two ($372) Dollars with interest and cost and the appellant desires to supersede said judgment.

Now we Baltimore & Ohio Southwestern Railroad Company principal, and American Surety Company of New York securities, covenant to and agree with the appellee J. G. Leach that the appellant will pay to the appellee all costs and damages that may be adiudged against the appellant on the appeal; and also that they will satisfy and perform the said judgment in case it shall be affirmed, or any

judgment or order which the court may render, or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid; and also pay all rents, hire, or damage, which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 4th day of December, 1915.

BALTIMORE & OHIO SOUTHWESTERN R. R. CO.,
By WILLIAM W. CRAWFORD, *Att'y.*
AMERICAN SURETY CO.,
By WILLIAM W. CRAWFORD, *Att'y in Fact.*

Attest:

ROBT. L. GREENE, *C. C. A.*

Filed Dec. 4, 1915. Robt. L. Greene, C. C. A.

5 American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Limited Power of Attorney.

Know all men by these presents:

That the American Surety Company of New York, a corporation of the State of New York, of No. 100 Broadway, in the City of New York, in said State, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint W. W. Crawford its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking, as follows: A supersedeas bond on behalf of the Baltimore & Ohio Southwestern Railroad on its appeal from a judgment of the Scott Circuit Court rendered at its 4th June 1915 term for $372.00, with interest and costs, in the case of J. G. Leach versus said Railroad hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligations as fully as the officers of said American Surety Company of New York could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

In witness whereof, the said American Surety Company of New York has caused its corporate seal to be hereunto affixed and these

presents to be duly executed by its proper officers at the
6 City of Louisville, State of Kentucky, on this 24th day of November, 1915.

AMERICAN SURETY COMPANY OF NEW YORK,

[SEAL.] By MASON B. BARRET,
Resident Vice-President.

Attest:
W. B. HARRISON,
Resident Assistant Secretary.

(Documentary Stamp.)

At a regular meeting of the Executive Committee of the Board of Trustees of the American Surety Company of New York, held at the Office of the Company at No. 100 Broadway, in the City of New York, on the seventeenth day of September, 1912, the following resolution was adopted:

"Resolved, That one of the Resident Vice Presidents, and one of the Resident Assistant Secretaries of this Company at Louisville, in the State of Kentucky, be and they hereby are authorized and empowered to make, execute and deliver, in behalf of the Company, unto such person or persons in the States of Kentucky and Tennessee, as they may select, its power of attorney constituting and appointing each such person its Attorney in Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, any particular bond or undertaking that may be required in the said States of Kentucky and Tennessee, the nature of such bond or undertaking to be in each instance specified in such power of attorney."

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Bennem, Assistant Secretary of the American Surety Company of New York, hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of New York, this 15th day of February, 1915.

[SEAL.] W. H. BENNEM,
Assistant Secretary.

7 STATE OF KENTUCKY,
County of Jefferson, ss:

On this day personally appeared before me, a Notary Public, in and for the County aforesaid, Mason B. Barrett and W. B. Harrison who, being duly sworn by me, did depose and say that they are respectively a Resident Vice President and a Resident Assistant Secretary, at the City of Louisville, of the American Surety Company

of New York; and they, as such Resident Vice President and Resident Assistant Secretary, respectively, did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of the American Surety Company of New York.

Witness my hand and seal, this 24th day of November, 1915.

[SEAL.] L. P. McGEE,
Notary Public.

Notary Public, Jefferson Co., Ky.
Commission expires Jan. 20, 1918.

8 COMMONWEALTH OF KENTUCKY,
Clerk's Office of the Court of Appeals:

As Clerk of the Court of Appeals of the State aforesaid, I certify that an appeal has been prayed, according to law, from a judgment obtained by J. G. Leach against Baltimore & Ohio Southwestern Railroad Company for $372.00 in the Scott Circuit Court on June 4, 1915, in a certain petition, and that a supersedeas bond has been executed. Wherefore the appellee and all others are hereby commanded to stay proceedings on said judgment.

Witness, Robt. L. Greene, Clerk of the Court of Appeals, this 4th day of December, 1915.

ROBT. L. GREENE, *C. C. A.*

[Endorsed:] Executed by delivering a true copy of within Supersedeas to J. G. Leach, this 9th day of December, 1915. Jas. K. Ewing, S. S. C., by L. L. Calvert, D.

9 *Summons on Appeal.*

The Commonwealth of Kentucky to the Sheriff of Scott County, Greeting:

We command you to summon J. G. Leach to appear before the Judges of the Court of Appeals of Kentucky, at the Capitol in Frankfort, on the first day of their next Winter Term, to show cause, if any he can, why a judgment obtained by him in the Scott Circuit Court against Baltimore & Ohio Railroad Company at its May Term, 1915 should not be reversed for errors therein contained; as we from its complaint are informed, and have then and there this writ.

Witness, Robert L. Greene, Clerk of our said Court, at the Capitol in Frankfort, this 11 day of November, 1915.

ROBT. L. GREENE, *C. C. A.*,
By T. M. JONES, *D. C.*

[Endorsed:] Executed by delivering to J. G. Leach, Nov. 13, '15. Jas. K. Ewing, S. S. C.

10 Scott Circuit Court.

Pleas.

Pleas before the Hon. Robert L. Stout, Judge of the Scott Circuit Court, at the Court House in the City of Georgetown, Scott County, Kentucky.

Caption.

J. G. LEACH, Plaintiff,

vs.

BALTIMORE & OHIO & SOUTHWESTERN and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILROAD COMPANY, Defendants.

Preamble.

Be it remembered that on the 22nd day of January 1915, came the Plaintiff by Counsel and filed his petition herein, said petition is in words and figures as follows to-wit:

11 J. G. LEACH, Plaintiff,

vs.

BALTIMORE & OHIO & SOUTHWESTERN RY. CO. and CINCINNATI & NEW ORLEANS & TEXAS PACIFIC RY. CO., Defendants.

Petition.

The plaintiff, J. G. Leach, states that the defendant, Baltimore and Ohio South Western Railway Company is — corporation duly created and authorized to sue and be sued by its corporate name "Baltimore & Ohio South Western Railway Company"; that the defendant, Cincinnati, New Orleans and Texas Pacific Railway Company is a corporation duly created and authorized to sue and to be sued by its corporate name "Cincinnati, New Orleans & Texas Pacific Railway Company" and that each of said defendants is and was at the time hereafter stated common carriers of goods for hire; that the defendant, Baltimore & Ohio South Western Railway Company operates a line of railroad from East St. Louis in the State of Illinois to Cincinnati, in the State of Ohio and also in and through certain parts of the State of Kentucky; that the defendant

12 Cincinnati, New Orleans & Texas Pacific Railway Company operates a line of *rialorad* from Cincinnati in the State of Ohio to Georgetown in the State of Kentucky; that on the 1st day of October 1914 plaintiff delivered to the defendant, Baltimore & Ohio Railway Company at East St. Louis 41 head of cattle for shipment and transportation to plaintiff over its own lines and that of the defendant Cincinnati, New Orleans & Texas Pacific Railway Com-

pany to Georgetown, Kentucky; that said defendant received took charge of and began the transportation of said cattle over its own line and that of its said connecting carrier, Cincinnati, New Orleans & Texas Pacific Railway Company, from said point of shipment to Georgetown, Kentucky. Plaintiff says that the defendant, Baltimore & Ohio Southwestern Railway Company for itself and as agent for the defendant, Cincinnati, New Orleans & Texas Pacific Railway Company undertook and agreed that they would jointly carry said live stock from East St. Louis to Georgetown, Kentucky in a prudent and safe manner and in the usual and customary time for shipment of live stock between said points. Plaintiff says that the usual and customary time for t-anspor-ation of live stock between said points over the lines of the defendants is 36 hours and said cattle
13 should have been delivered to plaintiff at Georgetown, Kentucky on Oct. 2" 1914 if defendants had transported them in the usual and customary time for shipments but plaintiff says that said stock was not so delivered, but by the carelessness and negligence of the defendants, their agents, servants and employees, said cattle did not reach Georgetown, Kentucky until the 6th day of October 1914 and that when the shipment did arrive there were two cattle missing, and one dead in the car and the remaining 38 head were weak, sick starved and in a pit-able condition and four mpre out of the 38 head died within a few days after their arrival: that said cattle, through the carelessness and negligence of the defendants, their agents, servants and employees, were delayed, neglected and not properly fed in transportation so that the death of the said five head resulted therefrom and the remaining 34 head were thereby so injured and damaged that they did no good for several months and were damaged at least five dollars per head by defendants in shipment as above stated. Plaintiff says that the five cattle which died and the two which defendants lost in said shipment were reasonably worth $28.00 per head or a total of $196.; that the 34 which lived were damaged as above stated five dollars per head or a
14 total of $170.00; defendants charged plaintiff $11.25 feed bill, when if said cattle had been promptly shipped no feed bill would have been necessary and this item was wrongfully collected from plaintiff by defendants. Plaintiff engaged a veter-nary to attend said cattle and paid him the sum of $6.00, which sum was made necessary by reason of the said wrongful acts of the defendants in the shipment of said cattle. Plaintiff says that by reason of all wrongful/y acts of the defendants he was damaged in the sum of $383.25 no part of which has been paid.

Wherefore plaintiff prays judgment against both of the defendants for the said sum of $383.25 and for his costs herein and for all proper relief.

B. M. LEE,
Attorney for Plaintiff.

Afterwards on the 2nd day of February 1915, at a court begun and held in and for the County of Scott, State of Kentucky, the following order was made:

15 *Order No. 1.*

J. G. LEACH

vs.

B. & O. AND C., N. O. & T. P. RY. CO.

This day came attorney and filed the answer of the C., N. O. & T. P. Ry. Co. herein.

The answer of the C., N. O. & T. P. Ry. Co. referred to in the foregoing order is as follows:

Answer of C., N. O. & T. P. Ry. Co.

J. G. LEACH

vs.

B. & O. AND C., N. O. & T. P. RY. CO.

Comes the defendant C., N. O. & T. P. Ry Co. and for answer herein says that it has no information sufficient to form a belief and therefore denies that the plaintiff on October 1st, 1914, or at any other time delivered to the B. & O. Ry. Co. at East St. Louis or at all 41 head of cattle or any cattle for shipment or transportation to plaintiff over its own lines of the defendant C., N. O.

16 & T. P. Ry. Co.'s lines or at all and on information and belief also denies that the defendant B. & O. Ry. Co. took charge of or began the *the* transportation of the said cattle over its own lines and that of its connecting carrier, this defendant from said point of shipment to Georgetown, Kentucky or at all, defendant also denies that the B. & O. R. R. for itself or as agent of this defendant undertook or agreed that they or it or this defendant would jointoy carry, or carry at all, said live stock from East St. Louis to Georgetown, Kentucky, in a prudent or safe manner or in the usual or customary time for shipments of live stock between said points or at all and it denies that the said B. & O. R. R. was its agent for any pr*a*pose. Defendant denies that the usual or customary time *time* for transpor-ation of live stock between said points over the lines of the defendants is 36 hours, but says that it is much longer, viz: — hours and it denies that said cattle should have been delivered to plaintiff at Georgetown, Kentucky, on October 2nd 1914 if defendants had transported them in the usual or customary time for such shipments and it says that said stock did arrive and were delivered in the usual and customary time for shipments between East St. Louis and Georgetown, Kentucky.

It denies that it was guilty of carelessness or negligence or that the said B. & O. R. R. was guilty of carelessness or negligence in

any way and it denies that by reason of any carelessness or
17 negligence on the part of it or the B. & O. R. R. said cattle were delayed in any way or that said cattle did not reach Georgetown until October 6th, 1914, but it says that said cattle arrived and were delivered on the — day of Oct., 1914. It denies that when the cattle did arrive two cattle were missing or any cattle were missing or that one was dead in the car or any cattle were dead in the car or that the remaining 38 head or any of same were weak or sick or starved or in a pit-able condition or that four more or any number died within a few days after their arrival or at all. It denies that said cattle were delayed or neglected or not properly fed in transportation or that any of said cattle died therefrom or *or* that any of said cattle thereby or at all injured or damaged or that any of same were damaged in the sum of $5.00 a head or any other sum and it again denies that it or its co-defendant were guilty of any carelessness or negligence.

It denies that any of said cattle were worth $28.00 per head but says that none of same were worth more than $— per head and it denies that any of said cattle were damaged in the sum of $5.00 per head or a total of $170.00 or any other sum. And it
18 denies that this defendant or its co-defendant charged plaintiff a feed bill of $11.25 or any other sum more than was necessary in the usual and customary transportation of said cattle. It denies further that plaintiff had to pay a veterinary $6.00 or any other sum by reason of any act of this defendant or its co-defendant. Defendant denies that plaintiff was damaged by any act on its part or in the sum of $383.25 or any other sum.

Wherefore, having fully answered, defendant prays to be hence dismissed with its cost and for all other proper relief.

J. CRAIG BRADLEY,
Attorney for Defendant,
C., N. O. & T. P. Ry. Co.

Afterwards on the 12th day of February, 1915, at a court begun and held as aforesaid, the following order was made:

Order No. 2.

J. G. LEACH

vs.

B. & O. AND C., N. O. & T. P. RY. CO.

19 This day came Attorney and filed the answer of the B. & O. S. W. Ry. Co. herein.

The Answer of the B. & O. S. W. Ry. Co. referred to in the foregoing order is as follows:

Answer of the B. & O. S. W. Ry. Co.

J. G. LEACH

vs.

B. & O. AND C., N. O. & T. P. RY. CO.

Comes the defendant B. & O. S. W. Ry. Co., and for answer herein denies that the plaintiff on October 1st, 1914, or at any other time delivered to the B. & O. Ry. Co. at E. St. Louis or at all 41 head of cattle or any cattle for shipment or transportation to plaintiff over its own lines or the defendant C., N. O. & T. P. Ry. Company's lines or at all and also denies that the defendant B. & O. Ry. Co. took charge of or began the transportation of said cattle over its own lines and that of its connecting carrier the C., N. O. &
20 T. P. from said point of shipment to Georgetown, Kentucky, or at all. Defendant also denies that the B. & O. R. R. for itself or as agent of the C., N. O. & T. P. undertook or agreed that they or it or this defendant would jointly carry, or carry at all, said live stock from E. St. Louis to Georgetown, Kentucky, in a prudent or safe manner or in the usual or customary time for shipments of live stock between said points or at all and it denies that the said B. & O. R. R. was the agent of the C., N. O. & T. P. for any purpose. Defendant denies that the usual or customary time for transportation of live stock between said points over the lines of the defendants is 36 hours, but says that it is much longer, viz: — hours and it denies that said cattle should have been delivered to plaintiff at Georgetown, Kentucky, on October 2nd, 1914, if defendants had transported them in the usual or customary time for such shipments and it says that said stock did arrive and were delivered in the usual and customary time for shipments between East St. Louis and Georgetown, Kentucky.

It denies that it was guilty of carelessness or negligence or that the said C., N. O. & T. P. was guilty of carelessness or negligence in any way and it denies that by reason of any carlessness or negligence on the part of it or the C., N. O. & T. P. said cattle
21 were delayed in any way or that said cattle did not reach Georgetown, Kentucky, until October 6th, 1914, but says that said cattle arrived and were delivered on the — day of October, 1914. It denies that when the cattle did arrive two cattle were missing or any cattle were missing or that one was dead in the car or any cattle were dead in the car or that the remaining 38 head or any of same were weaker sick or starved or in a pit-able condition or that four more or any number died within a few days after their arrival or at all. It denies that said cattle were delayed or neglected or not properly fed in transportation or that any of said cattle died therefrom or that any of said cattle were thereby or at all injured or damaged or that any of same were damaged in the sum of $5.00 a head or any other sum and it again denies that it or its co-defendant were guilty of any carelessness or negligence.

It denies that any of said cattle were worth $28.00 per head but says that none of same were worth more than $— per head and it denies that any of said cattle were damaged in the sum of $5.00 per head or a total of $170.00 or any other sum. And it denies that this defendant or its co-defendant charged plaintiff a feed bill of $11.25 or any other sum more than was necessary in the usual and customary transportation of said cattle. It denies fur-
22 ther that plaintiff had to pay a veterinary $6.00 or any other sum by reason of any act of this defendant or its co-defendant. Defendant denies that plaintiff was damaged by any act on its part in the sum of $383.25 or any other sum.

Wherefore, having fully answered, defendant prays to be hence dismissed with its costs and for all proper relief.

J. CRAIG BRADLEY,
Attorney for Defendant,
B. & O. S. W. Ry. Co.

Afterwards on the 17th day of February, 1915, at a Court begun and held as aforesaid, the following order was made:

Order No. 3.

J. G. LEACH

vs.

B. & O. AND C., N. O. & T. P. RY. CO.

By agreement of parties this case is assigned for the 11- day of the next term of this court to be tried.

23 Afterwards on the 8th day of May 1915, being during vacation came counsel for the defendants, B. & O. and C., N. O. & T. P. Ry. Co. and filed their joint amended answer herein:

Joint Amended Answer.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

Come the Baltimore and Ohio Southwestern, and the Cincinnati, New Orleans & Texas Pacific Railroad Companies and for amended answer herein, say that at the time they filed their original answer therein, they had been unable to investigate the facts in this case in any way, and that an answer being due a general denial was filed by each of them through their attorneys. They now ask leave to withdraw their original answer and herein file their joint answer in

which they set out their defense as disclosed by investigation of the facts in regard to the shipment.

First. They deny that the Baltimore and Ohio Railroad Company is an agent of Cincinnati, New Orleans and Texas Pacific Railroad Company for any purpose and deny that as agent for the Cincinnati, New Orleans & Texas Pacific Railroad Company
24 or at all, the said Baltimore and Ohio Railroad Company undertook or agreed that the said two roads would jointly or at all carry said live stock mentioned in plaintiff's petition from East St. Louis in the State of Illinois to Georgetown, in the State of Kentucky, or would carry said stock at all in a prudent or safe manner or in the usual or customary time for shipments between said points.

They deny that the usual or customary time for transporting live stock between said points over the lines of these two defendants or at all is thirty-six hours, but say that it much longer, namely at least sixty hours, and they deny that said cattle should have been delivered to the plaintiff at Georgetown, Kentucky on October 2nd, 1914, and deny that said cattle could have been delivered on said day, but say that with the time schedules then in force and according to the usual and customary time of shipment over said roads, said cattle could not have reached Georgetown in any event till October 4th, 1914.

They deny that they or either of them or any agent, servant or employee of them or either of them was guilty of any negligence or carelessness of any kind towards the plaintiff, and deny that by reason of any carelessness or negligence on the part of them or either of them that said cattle were delayed in any way, or
25 did not reach Georgetown till October 6th, 1914, but they say that said stock were transported in the usual and customary time for such transportation between East St. Louis, Illinois and Georgetown, Kentucky, and without any carelessness or negligence or any delay on the part of either of defendants, but they say that said cattle were stopped in transit as hereinafter set out and any delay in shipment was caused as hereinafter set out and was without any fault of any kind on the part of either of said defendants.

They say that they have no information sufficient to form a belief and consequently deny that when said cattle arrived at Georgetown two of same or any cattle were missing, or that one was dead in the car, or that the remaining thirty-eight were weak or sick or starved or in a pit-able condition except as hereinafter set out or that four or any cattle died after the arrival of said stock or at all, or that the death of any cattle or injury to any cattle or the condition of any cattle was the result or caused by any act of these defendants or either of them.

They deny again that they — either of them was guilty of any negligence or carelessnss in handling said stock in any way, or that they or either of them delayed same or neglected same in any
26 way, or failed to properly feed same in transportation, or that any of said cattle died or any of same were injured or

damaged by reason of any act of defendants or either of them, or that any of them were damaged in the sum of five dollars ($5.00) per head or any other sum by any act of these defendants or either of them or that any of said cattle died or were injured in any way by delay of any kind.

They deny that the plaintiff lost seven cattle by death or at all of the value of twenty eight dollars ($28.00) per head, but says that none of said cattle were worth more than fourteen dollars ($14.00) per head, and they deny that the plaintiff was thereby damaged in the sum of one hundred and ninety-six dollars ($196.00) or any other sum, and they deny that thirty-four cattle, or any number of cattle were damaged in the sum of five dollars ($5.00) per head or any other sum, or that the plaintiff was thereby damaged in the sum of one hundred and seventy dollars ($170.00), or any other sum and they deny that by reason of any act of these defendants or either of them, plaintiff was charged an extra feed bill of eleven dollars and twenty five cents ($11.25) or any other sum, or had to pay a veterinary bill of six dollars ($6.00) or any other sum or that plaintiff was damaged in the total sum of three hundred and eighty three dollars and twenty-five cents ($383.25) or any other sum by
27 any act of these defendants or either of them or at all.

Second. For further answer defendants say that the cattle when shipped were weak, sick and ill-fed, and in extremely poor condition, and were known by the plaintiff to be so at the time he shipped them, and that any death occur-ing to any of said cattle in transit, or any injury or damage to said cattle or any of same was simply the result of their condition at the time they were delivered to the defendant for transportation, and was not the result of any act of these defendants or either of them in any way in the handling or transpor-ation of said cattle, and was not the result of any delay of any kind no matter how caused.

Third. For further answer defendants say that they and each of them are common carriers engaged in interstate commerce and engaged in carrying goods, wares, live stock etc. for hire from points in one State to points in other States, and that the shipment of cattle mentioned in the plaintiff's petition herein, was a shipment for hire from East St. Louis in the State of Illinois to Georgetown in the State of Kentucky, and was an interstate shipment and that these defendants and each of them in the handling of said ship-
28 ment were acting as common carriers for hire engaged in interstate commerce. They state further that in handling said shipment both of said defendants were subject to all the rules, laws and regulations made and provided by the Statutes of the United States and by the Acts of Congress of the said United States for regulating and handling of traffic between different States and for the control of shippers and carrie-s engaged in interstate commerce, and that the contract of transportation between the plaintiff and the defendants herein was subject to such rules, laws and regulations.

It says that to govern shipments and transportation of cattle from points in one State to points in another State Congress of the United States passed the following Act which is now in full force and effect

as a law of the United States, and was in full force and effect at the time of said contract of shipment between the plaintiff and defendants, and at all times mentioned in plaintiff's petition and hereinafter set out.

"That in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot and mouth diseases and other dangerous contagious, infectious and com-
29 municable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections 4 and 5 of an Act entitled "An Act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," approved May 29th, 1884 (Twenty-third United States Statutes, thirty-one), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed, from time to time, to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary and all such rules and regulations shall have the force of law."

Pursuant to said Act the Secretary of Agriculture on May 20th, 1914, established the following rule governing shipment of live stock from a point in one State to a point in another State, and they say that said rules were in full force and effect at the date of said
30 contract of shipment between the plaintiff and defendants and at all time mentioned in plaintiff's petition and at all times hereinafter set out.

"The certificates of inspection or treatment issued by the inspector of the Bureau of Animal Industry covering interstate movements of live stock shall in all cases accompany the live stock to destination. Where interstate certification covering the movement of live stock is hereinafter provided for in these regulations, the certificate*d* shall become the property of the transportation company and shall be filed with the billing for future reference."

"No cattle shall be shipped interstate from any stock-yards where an inspector — the Bureau of Animal Industry is stationed without a certificate of inspection or of dipping issued by the said inspector."

They say further that the said cattle were shipped from the National Stock Yards at East St. Louis, Ill., and that there is an inspector of the Bureau of Animal Industry stationed at said Stock Yards. But they say that no certificate of inspection or of dipping was issued or accompanied the said shipment of cattle as required by said Act and the rules passed pursuant thereto, and that said inspector at said stock yards at the initial point of shipment failed to furnish such certificate for said shipment. They say that said
31 cattle had been inspected and were entitled to a health certificate. They say it was the duty of the inspector to furnish

such a certificate for said shipment and the duty of the plaintiff, the shipper to have obtained such a certificate for said shipment. But they say that the inspector negligently and in violation of said act failed to furnish said certificate and the plaintiff negligently and in violation of said act failed to obtain such certificate and by reason of such negligent failure on the part of them and each of them no such certificate accompanied said shipment of cattle as required by said act.

They say further that the defendant Baltimore and Ohio Railroad Co., transported said cattle in the usual and customary manner and without any delay of any kind from East St. Louis, Ill. to Cincinnati, Ohio, and there delivered same to its connecting carrier, the defendant Cincinnati, New Orleans & Texas Pacific Railroad Co., without any delay of any kind and in the usual time for such shipments and in accordance with the time schedules then in force. They say further however that before said shipment left Cincinnati, and immediately after it was delivered to the Cincinnati, New Orleans & Texas Pacific Railroad Company, the inspector of the Bureau of Animal Industry stationed at Cincinnati stopped further transpor-ation of said cattle because no certificate, as stated above,
32 accompanied said cattle, and forbade the said Railroad to carry the said stock further until investigation could be made by said Bureau. Whereupon the said Cincinnati, New Orleans & Texas Pacific Railroad Company returned said stock to the defendant Baltimore & Ohio Railroad Company under the orders of said inspector, and because of the lack of said certificates as above set out; and the said Baltimore and Ohio Railroad Company delivered same to the Cincinnati Union Stock Yards where same were held, watered, fed and cared for under the orders of said inspector until said cattle were released by him. They say that said cattle were released late on the evening of October 5th, 1914, and that same were immediately again delivered to the Cincinnati, New Orleans & Texas Pacific Railroad Company and shipped by that railroad on its first train leaving Cincinnati thereafter, and delivered at Georgetown, Ky. without any delay in transpor-ation of any kind, and in accordance with the time schedules then in force.

It says that the delay in the shipment of said cattle was caused as above stated, and was by reason of the fact that the inspector of the Bureau of Animal Industry at East St. Louis, Ill. failed to attach a certificate to said shipment of stock as he was required to do by said
Statutes, and by reason of the failure of the plaintiff the
33 shipper to obtain such certificate as required by said Statutes.

Fourth. For further answer defendants say that it is a common carrier engaged in interstate commerce, and engaged in carrying goods, wares, merchandise, cattle etc. for hire, from points in our State to points in other States, and that the shipment of cattle mentioned in plaintiff's petition was a shipment for hire from East St. Louis in the State of Illinois to Georgetown in the State of Kentucky, and was an interstate shipment, and the defendants in handling said shipment were acting as common carriers for hire engaged in interstate commerce. They say that in handling said

shipment they were subject to all of the rules, laws and regulations made and provided by the Statutes of the United States and Acts of Congress of the said United States for the regulation of the handling of traffic between different States, and for the control of shippers and carriers engaged in interstate commerce, and that the contract of transportation between the plaintiff and defendants herein was subject to such rules, laws and regulations.

34 They say that to govern the shipment and transportation of cattle from a point in one State to a point in another State, said Congress of United States passed the following Act which is now in full force and effect as a law of the United States, and was in full force and effect at the time of said contract of shipment between the plaintiff and defendants, and at all times mentioned in plaintiff's petition.

"That any common carrier, railroad or transpor-ation company receiving property for transportation from a point in one State to a point in another State shall issue a rece-pt or bill-of-lading to the lawful holder therefor for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transpor-ation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transpor-ation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill-of-lading of any remedy or right of action which he had under existing laws.

35 That the common carrier, railroad or transpor-ation company issuing such a receipt or bill-of-lading shall be entitled to recover from the common carrier, railroad or transpor-ation company on whose lines the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transportation thereof."

They say that under said act of Congress these defendants are required to issue every shipper of an interstate shipment a bill-of-lading or contract containing all of the terms governing said shipment, and they say that the said Baltimore & Ohio Railroad Company did deliver to the said shipper, the plaintiff herein, a contract or bill-of-lading signed by the plaintiff and defendant Baltimore and Ohio Railroad Company, which contains all of the terms and stipulations of said contract of shipment a copy of which is filed herewith. They say that one of the terms of said contract is as follows:

"That in the even- of any unusual delay or detention of said live stock caused by the negligence of said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept, as full compensation for all loss or damage

36 sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said live stock while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the

said carrier, or sued for in any court by the said shipper, unless a claim for loss or damages shall be made in writing verified by the affidavit of the shipper or his agent, and delivered to the General Freight Agent of said carrier at his office in Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurrs upon the line of connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time, to som- proper office- or agent of the carrier on whose line the loss *of* injury occurs."

They say further that no claim for damages was made in writing verified by affidavit of said shipper or his agent or at all, neither was such claim delivered to the General Freight Agent of the Baltimore & Ohio Railroad Company or at all within five days from the time said stock was removed from said cars or at all, nor was any claim of any kind made to its connecting carrier within five days or at all.

37 Wherefore, having fully answered these defendants pray to be hence dismissed with their cost and for all *either* proper relief.

BRADLEY & BRADLEY,
Attorneys for Defendants.

Afterwards on the 25th day of May 1915, at a court begun and held as aforesaid the following order was made:

Order No. 4.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

This day came attorney and filed the depositions of S. O. Parker for the defendant herein.

The depositions of S. O. Parker referred to in the foregoing order on page 59.

38 Afterwards on the 26th day of May 1915, at a court begun and held as aforesaid the following order was made:

Order No. 5.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

This day came attorney and filed depositions of Frederick B. Edmands for the defendant herein.

The depositions referred to in the foregoing order on page 67.

Afterwards on the 28th day of May 1915 at a court begun and held as aforesaid the following order was made:

Order No. 6.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

This day came attorney for plaintiff and filed a demurrer to defendants' third paragraph of the joint amended answer herein, and the court not being advised on said demurrer takes time.

39 The demurrer to the third paragraph of the joint amended answer referred to in the foregoing answer is as follows:

Demurrer to Joint Amended Answer.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

Comes the plaintiff and demurs generally to the third paragraph of the joint amended answer of defendant's because same does not state facts sufficient to constitute any defense to the plaintiff's cause of action set up in the petition.

(Signed) B. M. LEE,
Attorney for Plaintiff.

Afterwards on the 29th day of May 1915, at a court begun and held as foresaid the following order was made:

Order No. 7.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

40 The demurrer heretofore file- to the third paragraph of the defendants' joint amended answer was this day heard by the Court and sustained, to which ruling of the Court the defendant objected and excepted.

Afterwards on the 3rd day of June 1915, at a court begun and held as aforesaid the following order was made:

Order No. 8.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

This day received by mail in good order the interrogatories and cross-interrogatories of Dr. Timmons and Dr. D. C. Burnett which *was* this — filed.

The Interrogato*ries* and Cross Interror*g*atories of Dr. Timmons and Dr. Burnett are on page 74.

41 Afterwards on the third day of June 1915, at a court begun and held as aforesaid the following order was made:

Order No. 9.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

This day received by mail in good order the interrogatories and cross-interrogatories of J. P. Carney which *was* this day file-.

The interrogatories and cross-interrogat-ries *offered* to in the foregoing order are on page 71.

Afterwards on the 4th day of June 1915, at a court begun and held as aforesaid the following order was made:

Order No. 10.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

42 This day rec-ived by mail in good order the interrogatories and cross interrogatories of Dr. Bertram which *was* this day filed.

The interrogatories and cross-interrogatories of Dr. Bertram referred to in the foregoing order are on page 78.

Afterwards on the 4th day of June 1915 at a court begun and held as aforesaid the following order was made:

Order No. 11.

J. S. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

The demurrer to the third paragraph of defendants' answer heretofore filed was this day heard by the Court and sustained to which ruling the defendant objected and excepted.

Afterwards on the 4th day of June 1915 at a Court begun and held as aforesaid the following order was made:

Order No. 12.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

43 This day came attorney for the plaintiff and filed a reply to defendants' answer herein.

The reply referred to in the foregoing order is as follows:

Reply to Defendants' Answer.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

Comes the plaintiff and for reply to the joint amended answer of the defendants and to the second paragraph thereof, says it is untrue and he denies that the cattle when shipped were weak or sick or ill fed or in any extremely poor or any poor condition or were known by plaintiff to be so at the tim- he shipped them; he denies that the death of the cattle in transit or the injury or damage to said cattle or any of same was the result of their condition at the time they were delivered to the defendant for transpor-ation and he denies that it was not the result of the acts of the defendants or either of them in the handling or transportation of said cattle and he denies that it was not the result of delay of any kind.

44 2. For reply to the fourth paragraph of defendant's answer plaintiff says that when said shipment of cattle arrived at Georgetown, Ky., and before they were removed from the car in which they arrived, he called Z. L. Myers, who was the station agent of the defendant, C. N. O. & T. P. Ry. Co., and showed him the con-

dition of the cattle and called his attention to the fact of the missing cattle as claimed in the petition and then and there notified the said agent of the plaintiff's claim for the damages set up in the petition and the said agent then and there examined said cattle for the defendants and told plaintiff that no further notice would be required, but to make out his claim for damages and leave it with him (the said agent) and that it would be paid by defendants. He says that he relied upon said promise of said agent and did make out and deliver to him his claim for damages in accordance with the instructions given paintiff by said agent and these facts were by said agent forthwith communicated with the defendants and plaintiff says that the defendants waived any written notice or affidavit of the said claim and are and ought to be stopped to now rely on failure of plaintiff to give a written notice or file an affidavit which they, by the said agent, prevented plaintiff from filing.

Wherefore plaintiff as in his petition and for all proper relief.

(Signed) B. M. LEE,
Attorney for Plaintiff.

45 Afterwards on the 4th day of June 1915, at a court begun and held as aforesaid the following order was made.

Order No. 13.

J. S. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

By consent of parties the affirmative allegations of plaintiff's reply are traversed of record.

Afterwards on the 4th day of June 1915 at a court begun and held as aforesaid the following order and judgment was made:—

Order No. 14 *and Judgment.*

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

This cause coming on for trial and both parties having announced ready for trial and on motion of defendant S. B. Thornton the official Stenographer of this Court is ordered and directed to take down the testimony in this case as required by law.

And the plaintiff by attorney requested a panel of the jury and a panel having been called and a list of the panel given each to
46 the plaintiff and defendant by the Clerk the following jury was selected therefrom:—J. A. Hammon, Omer Hawkins,

Frank Rutledge, W. B. Arnold, J. M. Gaines, J. W. Greeg, R. S. Oldham, Ben Oldham, W. V. Featherstone, Ed Whitton, J. B. Aulick, and C. B. Gager, who were duly accepted and sworn according to law to try the issue joined and who after hearing the evidence introduced by the parties, instructions of the Court, came the defendant by attorney and objected to the giving of instructions No. 1 and 2 and the court being advised gave instructions to which the defendant accepted and argument of counsel heard the jury retired to consider their verdict, and afterwards reported into open court the following verdict:—

We the jury find for the plaintiff in the sum of $372.00 against the B. & O. Ry. Co., and we find in favor of the C. N. O. & T. P. Ry. Co.

It is therefore ordered and adjudged by the Court that the plaintiff recover of the defendant B. & O. Ry. Co. the sum of $372.00 with interest thereon at the rate of 6% per annum from this day until paid and its costs herein expended.

And it is further ordered and adjudged by the Court that the petition against the C. N. O. & T. P. Ry. Co., be dismissed and that the defendant C. N. O. & T. P. Ry Co recover of —— —— its costs herein expended.

Afterwards on the 5th day of June 1915 at a court begun and held as aforesaid the following order was made:—

47 *Order No. 15.*

J. S. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

This day came attorney for the B. & O. Ry. Co. and filed his motion and grounds for a new trial and moved the Court to set aside the verdict and judgment herein and to grant the defendant a new trial to which motion the plaintiff objected and being advised thereon the Court takes time.

The motion and grounds referred to in the foregoing order is as follows:—

Motion and Grounds for New Trial.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. Ry. Co.

The defendant Baltimore & Ohio Railroad Company comes and moves the Court to set aside the verdict herein and to grant it a new trial for the following reasons:—

First. Because the damages are excessive and appear to have been given under the influence of passion or prejudice.

Second. Because the verdict is not sustained by sufficient evidence and is against the overwhelming weight of evidence and is contrary to law.

48 Third. Because the court erred in sustaining the demurrer to the third paragraph of the defendant's answer to which ruling of the Court in sustaining said demurrer the defendant objected and excepted at the time.

Fourth. Because the Court erred in admitting incompetent evidence offered by the plaintiff to which ruling of the Court in admitting same the defendant objected and excepted at the time.

Fifth. Because the Court erred in rejecting competent evidence offered by the defendant, to which ruling of the court in excluding said evidence the defendant objected and excepted at the time.

Sixth. Because the court erred in refusing at the conclusion of plaintiff's testimony, to give on defendant's motion peremptory instruction in favor of the B. & O. Railroad Company, to which ruling of the court in refusing to give said instruction the defendant objected and excepted at the time.

Seventh. Because the court erred in refusing to give on defendant's motion at the conclusion of all of the testimony peremptory instruction in favor of the defendant Baltimore & Ohio Railroad Company, to which ruling of the court in refusing to give said instruction the defendant objected and excepted at the time.

49 Eighth. Because the court erred in giving on its own motion instructions one and two to each of them, to which ruling of the court in giving said instructions and each of same, the defendant objected and excepted at the time.

Said instructions One and Two above referred to are as follows:—

One. If the jury believe from the evidence that the defendant Baltimore & Ohio Railroad Company carelessly and negl-ently delayed the shipment of cattle to plaintiff from East St. Louis, Ill. to Georgetown, Ky. and that said delay was unreasonable and plaintiff's cattle died because of such delay, if there was delay, to the number of seven, and that the other cattle were damaged or impaired because of such unreasonable delay if any, the jury ought to find for the plaintiff the reasonable value of the cattle which died not to exceed $28.00 per head, or $195.00, and not to exceed for the cattle damaged in any $5.00 per head or $170.00 and not to exceed in all $365.00 and the Veterinary's bill not to exceed $6.00 and not to exceed in all $372.00, and unless they so believe they ought to find for the defendant.

Two. The measure of damages is the difference in value of the damaged cattle if any were damaged, between the value if the cattle had been delivered in good condition, and their value as they were delivered, not to exceed $5.00 per head for thirty-four (34) head or $170.00.

50 On this defendant prays the judgment of the Court.

BALTIMORE & OHIO RAILROAD COMPANY,
By J. CRAIG BRADLEY, *Att'y.*

Afterwards on the 9th day of June 1915, at a court begun and held as aforesaid the following order was made:—

Order No. 16.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

The motion and grounds of the defendant, B. & O. S.-W. Ry. Co. coming on to be heard, it is ordered that the same be and is hereby overruled, to which ruling of the court the defendant excepts and prays an appeal to the Court of Appeals of Kentucky which is granted.

Upon motion of the defendant leave and time until the 3rd day of the Next October term of this court is given the defendant to prepare and tender its Bill of Exceptions and Transcript of Testimony.

Afterwards on the 4th day of October, 1915 at a court begun and held as aforesaid the following order was made:—

Order No. 17.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

51 This day came the defendant, Baltimore & Ohio Railroad Co. by its Counsel and tendered and offered to file its Bill of Exceptions together with transcript of evidence and carbon copy herein.

Afterwards on the 5th day of October, 1915 at a Court begun and held as aforesaid the following order was made:—

Order No. 18.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

This day came defendant by Counsel, and his bill of Exceptions and Stenographer's transcript of evidence herein as part of said Bill of Exceptions, which was heretofore tendered in court within the time allowed by law, which having been approved by Counsel for plaintiff and defendant as shown by their endorsement thereon, and

having been duly examined and approved and signed by Hon. Robert L. Stout the Judge who presided at the trial of this case and the Judge of this Court, the same are ordered to be and are now filed and made a part of the record without being spread upon the Order Book.

The Bill of Exceptions of the Baltimore & Ohio Railroad Co. and the Cincinnati, New Orleans & Texas Pacific Railroad Company referred to in the foregoing order is as follows:—

52 *Bill of Exceptions.*

J. G. LEACH

vs.

BALTIMORE & OHIO RAILROAD CO., CINCINNATI, TEXAS AND NEW ORLEANS CO.

Be it remembered that on the trial of this case on May 4th, 1915, the plaintiff, J. G. Leach testified in his own behalf and introduced as witness in his own behalf — Shropshire, Raymond Williamson, — Hall, T. G. Spradling and Zack L. Myers, and plaintiff was recalled and testified again.

At the conclusion of all of the evidence introduced by the plaintiff, the defendant Baltimore and Ohio Railroad Co., and the Cincinnati, New Orleans & Texas Paicfic Railroad Co. moved the Court to instruct the jury peremptorily to find for the defendants and each of them, to which motion plaintiff objected and the court being advised refused to give said peremptory instructions in favor of the defendants or either of them, to which ruling of the Court in refusing to give said instructions both of the defendants objected and excepted at the time and still excepts.

The defendants Baltimore & Ohio Railroad Company and Cincinnati, New Orleans & Texas Pacific Railroad Company then read in their behalf the depositions of E. B. Padgett, O. C. Benton, O. Petzold, C. G. Davis, James P. Kenny, A. J. Warnker, Dr. Bertram, S. O. Parker, E. B. Edwards and J. P. Carney.

53 This was all of the evidence offered or submitted at the trial.

Upon the conclusion of all the testimony on behalf of both parties, plaintiff and defendants as shown by said transcript, the defendants again moved the court to instruct the jury peremptorily to find for said defendants and each of them, to which motion plaintiff again objected and the court being advised gave to the jury peremptory instructions to find for the defendant Cincinnati, New Orleans & Texas Pacific Railroad Co., but refused to give said instructions in favor of the Baltimore & Ohio Railroad Company, to which ruling of the Court in refusing to give said peremptory instructions in favoe of the defendant Baltimore & Ohio Railroad Company objected and excepted at the time and still excepts.

Each of said witness- as set out above was duly sworn and testified

as shown by the official report of S. B. Thornton the official stenographic report- of this Court, whose report, certified to by him, contains all of the evidence offered at the trial and the objections made by the parties, and ruling made by the Court thereto, exceptions taken to the *fulings*, and said report which is marked for identification, "Transcript of Testimony" with the number and style of this action is approved by the Judge and now made a part of this bill of exceptions, and ordered to be transmitted by the Clerk of this Court to the Clerk of the Court of Appeals at Frankfort as a part of the record herein.

54 The Court then of its own motion gave instructions One and Two, which are as follows:

"One." If the jury believes from the evidence that the defendant Baltimore and Cincinnati Railroad Company carelessly delayed the shipment of cattle to plaintiff from East St. Louis, Ill., to Georgetown, Kentucky and that said delay was unreasonable and plaintiff's cattle died because of such delay, if there was a delay, to the number of seven, and that the other cattle were damaged or impaired because of such unreasonable delay if any, the jury ought to find for the plaintiff the reasonable value of the cattle which died, not to exceed $28.00 per head, or $196.00, and not to exceed for the cattle damaged $5.00 per head or $170.00, and not to exceed in all $366.00 and the Veterinary's bill not to exceed $6.00 and not to exceed in all $372.00 and unless they so believe they ought to find for the defendant.

"Two." The measure of damage is the difference in value of the damaged cattle, if they were damaged, between the value of the cattle — had been delivered in good condition, and their value as they were delivered not to exceed $5.00 per head for thirty-four head or $170.00."

To the giving of said instructions and each one of same the defendant Baltimore & Ohio Railroad Company objected, said objection was overruled and said instruction was given by the Court, to

55 which ruling of the court in giving said instructions and each one of same, the defendant Baltimore & Ohio Railroad Company objected and excepted at the time.

The foregoing instructions are the only ones offered, given or refused.

The verdict and judgment having been rendered and entered as shown by the record herein, and the defendant Baltimore & Ohio Railroad Company having moved the Court to set aside the verdict and judgment and to grant to it a new trial herein, to which motion plaintiff objected, and said motion having been overruled by the court, to which action of the court in overruling said motion the defendant excepted at the time and still excepts, and the defendant having prayed an appeal to the Court of Appeals of Kentucky, which is granted, this bill of exceptions is not filed by the Court, within the time allowed by court for filing it and is made a party of the record herein without being spread upon the order book.

Witness the hand of the Honorable, Judge Robert L. Stout Judge of the Scott Circuit Court, this — day of — 1915.

(Signed) ROBERT L. STOUT,
Judge Scott Circuit Court.

Afterwards on the 15th day of October 1915, at a Court begun and held as aforesaid the following order was made:

Order No. 19.

JOHN LEACH

vs.

B. & O. R. R. Co. and C., N. O. & T. P. R. R. Co.

The Clerk of this Court is directed to copy the entire record in this case for the Court of Appeals.

56 Depositions of E. B. Padgett, C. C. Benton, O. Petzold, C. G. Davis, and James P. Kennedy on behalf of defendants referred to on page — *is* as follows:

Depositions of E. B. Padgett, O. C. Benton, O. Petzold, C. G. Davis, James P. Kennedy.

J. G. LEACH

v.

B. & O. and C., N. O. & T. P. RY. Co.

Depositions taken at the law office of Harmon, Colston, Goldsmith, and Hoadly, Cincinnati, Ohio, by agreement, to be read as evidence on behalf of the defendants in the above-styled case, plaintiff present by H. M. Lee, attorney, and defendant by J. Craig Bradley, attorney.

E. B. PADGETT, being by me first duly cautioned and sworn, deposes and says as follows:

Examined by Mr. Bradley:

Q. What is your name?
A. E. B. Padgett.
Q. Your age.
A. 42.
Q. Your present occupation?
A. Night yardmaster for Q. & C.
Q. Where were you stationed?
A. McLean Avenue & Gest Streets, Cincinnati.
Q. What reference to the connection between the B. & O. and the

C., N. O. & T. P. Railroad, how far is this from where the freight shipments are received by the Q. & C. from the B. & O.?

57 A. It is not quite a quarter of a mile.

Q. On October 5th 1914, if you made any inspection of a car of cattle billed from the National Stock Yards, East St. Louis, Illinois, to J. G. Leach, Georgetown, Kentucky, please state where you made such inspection and what the result of it was?

A. I made an inspection at McLean Avenue and Gest Street and found one head dead and three head down and one apparently in distress.

Q. On what date was this inspection made?

A. On October 5th, at 8:35 p. m.

Q. Do you know of your own knowledge as to whate time on that day this car of cattle was received on the B. & O.?

A. No, sir; I cannot answer that. The car was in the yard when I came on duty. I do not know the exact time when it was due.

Q. I show you a writing purporting to be signed by E. B. Padgett, O. C. Benton, O. Petzold and C. Davis. Is that the original of your report made of the inspection of these cattle?

A. Yes, sir; that is it.

Q. You speak of one of the cattle being down. What was the general condition of all the cattle at the time you made the inspection?

A. Well, they seemed to be all in a bad shape. The car seemed to be crowded. The bill called for 41 in the car.

Q. What size car was it?

A. It was 36 ft. just a medium stock car.

58 Q. Was the car comparatively full, or was it crowded?

A. The car was crowded.

Q. How many cattle were down in the car, did you say?

A. There were three down, one dead.

Q. What was then done in regard to the dead cattle?

A. We attempted to get the cattle up that was down, but we could not do it. The car was then forwarded to Georgetown on third 51.

Q. What time did that leave McLean Avenue yard?

A. I could not give you the exact time of leaving, but it was around one o'clock some time.

Q. Was the first cattle train leaving Cincinnati over the Q. & C. after you received the stock?

A. It was the first short haul train that we have. We have a through train but no short haul.

Q. Are the McLean Avenue Yards the place where trains are made up for shipments south?

A. Yes sir; where all trains are made up going south on the Q. & C.

Q. What is your regular occupation there? Did this inspection come within your regular duties?

A. Well, no sir, not exactly. I was called on by the clerks to help them inspect the car on account of the condition it was in.

As a usual thing, I do not inspect the cars because I do not see them all.

Q. Were these large cattle or what size cattle were they?

59 A. Well they were small cattle.

Q. Would you call them first class stock or what class stock were they? How would you class them?

A. I don't know. I could hardly say about that. It is hard to tell in a car, and dark, just what class they were.

Q. And there general condition I believe you have stated?

A. Yes.

Q. What was that?

A. The general condition was bad. That is, the car was loaded pretty well to its capacity.

Q. And the condition as to strength, &c.?

A. They all looked to be weak.

Q. You did not have any further connection with handling this car?

A. No sir; not after it left McLean Avenue. They put on 51 there and went south.

No cross examination.

Signature waived.

O. C. BENTON, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. Bradley:

Q. State your name, age, residence and present occupation?

A. O. C. Benton, Yard Master C., N. O. & T. P. age 41; residence, Cincinnati.

Q. Where are you stationed?

A. Gest & McLean Avenue.

60 Q. Were you present when this inspection was made which has just been testified to by Mr. Padgett of a car of cattle shipped from the National Stock Yards, East St. Louis, Ill., to J. G. Leach, Georgetown, Kentucky?

A. Yes, sir.

Q. Are you one of the men who signed this report which has just been filed?

A. Yes, sir; that is my signature.

Q. What did you find to be the general condition of this entire bunch of cattle?

A. Exhausted condition, and worn out; weak.

Q. How many of them were down in the car at that time?

A. Three cattle down and one dead.

Q. How far is the point where you inspected them from the point where they had been received by the Q. & C. from the B. & O.?

A. Something less than a quarter of a mile, about a quarter of a mile.

Q. Were any of the cattle dead?

A. One dead.

Q. What attempt, if any, was made to get these cattle up and get the car in condition.

A. We endeavored to get those that were down on the feet, but we didn't have very much luck at it. They were tired and worn out.

Q. What was the reason you could not get the cattle up?

A. Mainly because we did not feel like getting inside of the car and working with them on account of the crowded condition
61 of the car, and short time we had use of the car, &c.

Q. Did the condition of the cattle themselves have anything to do with the fact that you were unable to get them on their feet?

A. Not at all, only the worn out condition; nothing wrong with them more than weak.

Q. What size cattle were they in regard to weight &c.? Were they small?

A. I think that the statement was that they were y-arlings. Taking from that, I took it that they were between a year and eighteen months old, light cattle and rather, worn down and thin condition and none of them were in good flesh.

Q. Was that the last time you noticed them?

A. I passed the car several times after I had made this inspection.

Cross-examination by Mr. Lee:

Q. Do you know when this car of cattle was delivered by the B. & O. to the C., N. O. & T. P.?

A. I could not say. The car was there when I came on duty at six o'clock.

Q. Whose car were they in—the B. & O. car or the C., N. O. & T. P.?

A. A foreign car, S. W. S. C. L.

Q. Do you know whether that was the car that they left the National Stocks Yards in, or another?

A. There was no notation on the billing showing any transfer.

Q. How long was it from the time they were received by the C., N. O. & T. P. at Cincinnati before they left Cincinnati for Georgetown?

62 A. I could not say exactly what time they were received, but they left between twelve and one, to the best of my knowledge, or along about one o'clock. I would have to have the leaving book for that train to give the exact figures. Our book would show it exactly.

Q. Who has custody of that record which shows the time the cattle were received by the C., N. O. & T. P. and the time they left Cincinnati?

A. Mr. Carroll's office will show the time when they left—the O. S. book which shows the exact time the train left. Also the inspector at the B. & O. received a slip.

Q. Did you count or attempt to count the number of cattle in the car at the time?

A. I made no attempt to count them. It was dark and after

night, and while it was not impossible, it would be a very bad job to do it.

(Signature waived.)

O. PETZOLD, being by me first duly sworn, deposes and says:

Direct examination by Mr. Bradley:

Q. Give your name, age and present occupation?

A. Otto Petzold; Yard Master, McLean Avenue; 36 years.

Q. Were you employed by the Q. & C. at the time this inspection was made which has been referred to in the other depositions of the J. G. Leach, cattle?

63 Yes, sir.

Q. Were you one of those who signed the report which has been filed?

A. Yes sir.

Q. What did you find to be the general condition of the entire bunch of cattle that you inspected there that night?

A. Well, I saw them to be just as Mr. Padgett said here before, because I was there with him. There was one cattle down and found one dead, and there were three more of them lying down and they were not dead.

No cross-examination.

Signature waived.

G. C. DAVIS, being first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. Bradley.

Q. Your full name?

A. C. G. Davis.

Q. Your present occupation?

A. Yard foreman.

Q. Where?

A. Gest & McLean Avenue, Cincinnati Southern; have charge of the switch crew.

Q. What is your age?

A. 29 years.

Q. Were you present when this inspection which we have referred to of the cattle at the McLean Avenue Yards, of J. G. Leach was made?

64 A. I was.

Q. Were you one of those that signed the report?

A. Yes, sir, I was.

Q. Did you have any further connection with this shipment, beyond the inspection of it?

A. I handled the train from Cincinnati to Ludlow.

Q. What time did the train leave Cincinnati?

A. Around one o'clock. I do not know the exact time, but about one o'clock.

Q. While the train was under your charge, was there any rought handling of the train between Cincinnati and Ludlow brought to your attention in any way?

A. None.

Q. Have you a record of when this shipment of stock was received by the Q. & C. railroad by the B. & O.?

A. No, sir. It says there "5:30 received at the B. & O. connection with the Southern."

No cross-examination.

Signature waived.

JAMES P. KENNEDY, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. Bradley:

Q. What is your name, age, residence and occupation?

A. James P. Kennedy; age 20; Cincinnati; Yard Clerk Cincinnati Southern, at Gest and McLean Avenues.

Q. Did you check this car of stock when it was received from the B. & O. Railroad by the C., N. O. & T. P.?

65 A. I took it the first time it came to the C., N. O. & T. P.

Q. Did you take take it the second time it was received?

A. No, sir. It was in McLean Avenue Yards when I came to get it.

Q. The first time that it came there, what date was that?

A. It was the third, I think.

Q. Have you a record showing that?

A. There is a record at the office.

Q. I show you a statement dated October 7th, and signed by you, and ask if this is statement of inspection of this car of cattle made by you?

A. That is a statement of the inspection of the date. I never seen the car on that day. This is the day I received the copy to sign.

Q. What was the date you made the inspection?

A. October third.

Q. I show you another statement which you made out and signed; is that a record of your inspection of the same car?

A. This is the check of the statement of the night I checked the car, when I took the billing off.

Q. That is October third, you have just said?

A. Yes, sir; October third.

Q. You state in there that "No health certificate or revenue billing attached." What do you mean by that "health certificate"?

A. Well, there is supposed to be a health certificate as to the condition of the stock when the car arrived at the connection. This card is supposed to be at the end of the side of the car, and

66 there was no such billing.

Q. What notation did you make of that?

A. What I have there.

Q. Was that reported to the Government Inspector, or have you any knowledge as to what action the Inspector of the Bureau of Animal Industry took with reference to this car?

A. No, sir.

Q. Did you make any report to him?

A. No, sir.

Q. Where did your report go to?

A. To Mr. J. F. Carroll, Assistant Agent.

Q. Do you know what was done with this car after this inspection by you on October third?

A. The car was returned to the B. & O. after I inspected it the first time.

Q. On account of the lack of this health certificate?

A. Yes, sir.

Q. That was October third, I believe you said?

A. I don't know exactly whether it was returned the evening of the third or the morning of the fourth.

Q. Do you know of your own knowledge where that car was kept from that time until it was received by the C., N. O. & T. P. at Cincinnati?

A. No, sir.

Cross-examination by Mr. Lee:

Q. When did you write this paper filed without date (Exhibit "C"?

67 A. I evidently wrote that the next morning before going home.

Q. The next morning?

A. I examined the stock in the evening and made my report in the morning.

Q. Where should this health certificate have been?

A. The health certificate should have been right with the car. It should have been pinned to the billing, or else tacked on the car.

Q. You state in that note or report that there was only one tack holding the billing and it was hanging loosely on the side of the car; is that true?

A. Yes, sir.

Q. Is that the first time you saw the stock?

A. That is the first time I saw the stock.

Q. When you made that report?

Q. Yes, sir.

Q. You say in this writing that you called someone's attention whose attention did you call to it?

A. Called Mr. O. C. Benton's attention to it when I came to the office.

Q. Who was Mr. O. C. Benton?

A. He was Chief Yard Clerk of the Q. & C. at McLean Avenue at that time.

Q. The Q. & C. had at that time already received from the B. & O. a shipment of cattle had it not?

A. No, sir; not this shipment of cattle. This was the first
68 time this shipment was delivered to the C., N. O. & T. P.

Q. Well, did the C., N. O. & T. P. have it then in its charge for transportation to Georgetown?

A. I examined the car right after the B. & O. engine cut off from it, and the C. S. engine hadn't started to work at that connections yard, and nobody had seen the car before me the first time.

Q. What time did the B. & O. cut loose from it on the track of the C., N. O. & T. P.?

A. It must have cut loose at 5:50, because the car was standing by itself when I got there at five or ten minutes after six.

Q. That was on the third you say?

A. Yes, sir.

Q. Did you see the B. & O. cut loose?

A. No, sir. The car was standing by itself.

Q. How are you able to tell *now* long it had been cut loose by seeing it standing there?

A. The day clerk would have put it in before I came to work.

Q. You do not know how long the car was there?

A. I took my record from the inspectors record when the car was put in.

Q. All you know is that you saw *that you saw* the car when you went on duty that evening, the car was standing on the Q. & C. track?

A. Yes, sir.

69 Q. And a number of cattle were down at that time?

A. There were about thirteen cattle down in the car.

Q. What became of the cattle after that, do you know?

A. I took the billing around to the office and called Mr. Benton's attention to it, and our bill clerk. I called his attention to the fact that there was no health certificate, and after that I did not see the car any more that night, because I had other work to do and other connections to work with.

Q. Then the first time you saw this car was on the evening of October third and it left about twelve or one o'clock the next night; is that right?

A. No sir; the car was returned to the B. & O.

Q. It left Cincinnati for Georgetown about twelve o'clock?

A. No, it didn't leave the next night.

Q. When did it leave?

A. The car came back to us on the fifth and — checked by the day man.

Q. And left on the night of the fifth?

A. It left on the morning of the sixth from Cincinnati, about one o'clock, I guess.

(Signature waived.)

O. C. BENTON, recalled, testified as follows:

By Mr. Bradley:

Q. Mr. Benton, as yard clerk at McLean Avenue, do you make records of the receipts and of the disposition of various cars
70 of stock coming in there for shipment?

A. I make record of the receipt of them, or rather the record man turns in a record of them.

Q. To what office are they turned in?

A. Mr. Carroll's office,—all records.

Q. Or records of any other handling of any other cars of stock are in the hands of Mr. J. P. Carroll?

A. The entire records of handling.

Q. Both first and second receipts?

A. First receipt and subsequent delivery to B. & O. and the receipt by the C. & S.

Cross-examination by Mr. Lee:

Q. What took place between the two railroad companies in the transfer of the car of stock from one to the other?

A. I don't know as I understand your question; you mean the usual process.

Q. Yes?

A. The car of stock coming from the B. & O. is set on our connection. Our engines are working there and carrying it around as soon as possible after delivery, and if it is close to train time, we are notified by his yard clerk or master at Eighth Street that there is stock there for us, and our stock is brought through, and very often our clerk gets the record before it is turned around and he has a record of the condition of the cattle.

Q. There should be shipping instructions and health certificates attached to the car to go with the shipments, should there not?
71 A. At this date there should have been a bill of health—the Government health certificate—accompanying the billing for the car entering into Kentucky.

Q. And that should be attached to the car?

A. To be attached to the billing, which is tacked to the car. They should tack that billing to the car.

(Signature waived.)

Certificate.

STATE OF OHIO,
Hamilton County, ss:

I, Buchanan Perin, a Notary Public in and for Hamilton County, Ohio, do hereby certify that the foregoing depositions of E. B. Padgett, O. C. Benton, O. Petzold, C. G. Davis, and James P. Kennedy were taken before me at the place mentioned in the caption, on the 21st day of May, 1915, pursuant to argument of counsel for both sides, notice being waived, that said witnesses were each

by me duly sworn before giving his evidence; that the evidence of said witnesses was by me taken in shorthand in his presence, and by consent and agreement of the parties thereafter transcribed,—reading of the deposition to the witness and his signature thereto, being waived.

I further certify that the foregoing is a true and correct transcript of the testimony of said witnesses so taken as aforesaid.

The parties were present as stated in the caption.

72 Given under my hand and Notarial Seal this 22nd day of May, 1915.

[SEAL.] (Signed) BUCHANAN PERIN,
Notary Public, Hamilton County, Ohio.

My commission expires May 31, 1917.

My fees, $6.00, for taking these depositions, were paid by defendants.

(Signed) B. PERIN, *Notary.*

The writing referred to in the deposition of E. B. Padgett, marked Exhibit "A" is as follows:

EXHIBIT A.

10-11-14.

Mr. KING: Examination of S. W. S. C. L. 8087 at 8:35 P. M. 10/5-14 shows that one head is down and in distress and one head dead and three other head down for rest. Entire lot of cattle are yearlings and appear to be worn out and in a very much exhausted condition and car is loaded close to limit capacity as billing calls for 41 head, this car was received from the B. O. at 5:30 P. M. 10/5-14.

(Signed) E. B. PADGETT.
O. C. BENTON.
O. PETZOLD.
C. DAVIS.

The writing referred to in the deposition of James P. Kennedy, marked Exhibits B and C are as follows:

73 EXHIBIT B.

File 689-C.

S. W. S. X. 8087.

McLean Ave. Station.

Mr. J. F. Carroll, Assistant Agent, City.

CINCINNATI, OHIO, Oct. 7-14.

DEAR SIR: I found car S. W. S. X. 8087, stock for Georgetown, Ky., on B. & O. at 6.20 P. M. with 13 head of cattle down. I got

11 of them up, one apparently was dying, but could not tell if other one was in distress or not. Car checked by Day Clerk.

(Signed) J. P. KENNEDY.

EXHIBIT C.

Mr. Carroll: I checked S. W. S. X. 8087 car of stock for Georgetown, Kentucky last night and found the side card hanging loosely with one tack in upper corner. No health certificate or revenue Billing attached I called Yard Clerk Benton's attention to the fact. When checked by me one cow was down and looked to be in distress.

(Signed) JAMES P. KENNEDY.

74 Deposition — S. O. Parker, on behalf of the defendants referred to on page — is as follows:

Deposition of S. O. Parker.

K. G. LEACH

v.

B. & O. AND C., N. O. & T. P. RY. CO.

Deposition of S. O. Parker, witness for defendant, taken by agreement of counsel for plaintiff and defendant, at the offices of Harmon Colston & Hoadly, 300 St. Paul Bldg., Cincinnati, Ohio, May 21, 1915, in an action now pending in the Scott Circuit Court, wherein J. G. Leach is plaintiff and The Cincinnati, New Orleans & Texas Pacific Railway Company is defendant.

The said S. O. PARKER, having been first duly sworn, deposes and says as follows:

Direct examination.

By Mr. Bradley:

Q. Please give your name, age and present occupation?

A. S. O. Parker, sixty-seven; chief clerk car accountant C., N. O. & T. P. Railway.

Q. Cincinnati?

A. Cincinnati, Ohio.

Q. As chief clerk have you in your possession the record showing the handling of S. W. S. X. car No. 8087, billed from Nashville Stockyards to East St. Louis, Illinois, to J. G. Leach, Georgetown, Kentucky, by the C., N. O. & T. P. Ry. Co.?

75 A. I have the records of the movement of this car. I do not know where it was billed. We do not have that in our office.

Q. You just simply have the record of the movement of that car?

A. From the B. & O. railroad to Georgetown, Kentucky.

Q. State what these records show, if you please?

A. Car was delivered by B. & O. to C., N. O. & T. P. October 3, 1914, at six o'clock P. M.; returned to B. & O. October 3, 1914, 10:45 P. M. for health certificate. Delivered again by B. & O. to C., N. O. & T. P. October 5, 1915, 5:15 P. M.; moved from Ludlow, Kentucky, 12:45 A. M., train 3rd 51, October 6, 1914, and to Georgetown same train and date.

Q. Did you state what time train 3rd 51 left?

A. Yes, 12:45 A. M. next day, October 6.

Q. Do your records show anything in regard to the billing of this car, what it contained and so forth?

A. Our records show that the car was loaded with cattle, consigned to Georgetown, Kentucky.

Q. Does it show to whom they were consigned?

A. No, sir.

Q. Does it show the number of cattle?

A. It does not.

Q. Is that the entire record that you have of the handling of this car by the C., N. O. & T. P. Railroad?

A. That is all, except the names of the parties signing the reports.

76 Q. These records,—how are these records brought to your office, how are they sent to your office?

A. By train mail.

Q. And are you in charge of the original records of the handling of this car?

A. This is the original record, yes, sir.

Q. I will ask you to file these originals with the stenographer after you have made a copy for your own use, to be attached as an exhibit to your deposition?

A. Yes, sir.

(Same is hereto attached as Exhibit A and made part hereof.)

Cross-examination.

By Mr. Lee:

Q. You have no personal knowledge of any of the handling of the car; what you have stated is merely what the records of your office show?

A. That is right, sir.

Certificate.

THE STATE OF OHIO,
Hamilton County, ss:

I, Eugene Brunsman, A Notary Public, in and for the County and State aforesaid, duly commissioned and qualified, do
77 hereby certify that the above named S. O. Parker was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition was reduced to writ-

ing by J. A. Hamelrath, a disinterested person, and signature of witness was waived; that the said deposition was duly taken by me pursuant to agreement by and between counsel for plaintiff and defendant, at the office of Harmon, Colston & Hoadley, St. Paul Building, Cincinnati, Ohio, on Friday, May 21st, 1915, and that I was at the time of so taking said deposition a Notary Public in and for Hamilton County, Ohio.

In Testimony Whereof, I have hereunto set my hand and Official Seal, this 24th day of May, A. D. 1915.

[SEAL.] (Signed) EUGENE BRUNSMAN,
Notary Public, Hamilton County, Ohio.

Fee for taking above deposition $2.00 paid by the defendant.

Exhibit "A" referred to in the deposition of S. O. Parker is as follows:

Exhibit "A".

Daily Interchange Report of Cars.

From Baltimore & Ohio R. R. to C., N. O. & T. P., 10/3, 1914.

Marks.	Number. Loaded.	Number. Empty.	Kind.	Remarks or local information as required.			Hour.	Point of shipment.	Final destination.	Contents.
2	3	4	5	6	7	8	9	10	11	12
CHD	45113	.....	B	10/3	.....	11:30	.....	.....	.....	Salt.
OWPW	14318	.....	B	10/3	.....	A	.....	.....	Crawley, La.	
B&O	97360	.....	B	10/3	.....	....	.....	.....	Dalton.	
Rye	.....	113776	B	10/3	.....	....	.....			
Ga	.....	7253	B	10/3	.....	....	.....			
Sou	.....	25173	B	10/3	.....	....	.....			
Ga	.....	8636	B	10/3	.....	2	.....			
CNO&TP	.....	14366	B	10/3	.....	....	.....			
Sou	.....	135321	B	10/3	.....	....	.....			
CNO&TP	.....	12906	B	10/3	.....	....	.....			
B&O	146829	.....	B	10/3	.....	6:00	4:30 P. M.	.....	Danville.	B. Iron
LW	30659	.....	B	10/3	.....	P	.....	.....	Lemon City.	BBA
CP	122516	.....	B	10/3	.....	....	.....	.....	Erlanger.	
PL	541895	.....	B	10/3	.....	....	.....	.....	Athens, O.	Corn.
Sou	.....	43439	..	10/3	.....	6:00	5:20 P. M.			
SWSE	8087	.....	..	10/3	.....	P	.....	.....	.....	Stock.
——	8756	.....	..	10/3	.....	....	.....			

I certify that these cars were received as above:—
J. F. CARROLL, *R. R.*

C. E. FISH, *Agent.*

Daily Interchange Report of Cars.

From C., N. O. & T. P. to B. & O., Oct. 3rd, 1914.

SOU	43611	.....	S	....	....	....	3:35 P. M.	.....	Stock U. S. Yards
SOU	43705	.....	S	....	.....	....	.....	.....	" " "
SWSCL	8087	.....	S	....	.....	....	10:45 P. M.	.....	Stock ret. for health cert.

2

I, certify that these cars were received as above.

(Signed) C. E. FISH.
J. F. CARROLL, *Agent.*

THIS PAGE

Daily Interchange Report of Cars.

From B. & O. R. R. to C., N. O. & T. P. R. R., 10/5, 1914.

6—938

SOUTHWESTERN R. R. CO. VS. J. G. LEACH.

41

Marks.	Number. Loaded.	Number. Empty.	Kind.	Remarks or local information as required.			Hour.	Point of shipment.	Final destination.	Contents.
2	3	4	5	6	7	8	9	10	11	12
CNOTP	.....	12244	B	10/5	.....	6:30	2:45 A. M.			
KCS	.....	13876	B	10/5	.....	A	.....			
HCAN	.....	311	B	10/5	.....	....	.....			
NYM&H	.....	72984	B	10/5	.....	....	.....			
MP	27982	.....	B	10/5	.....	....	.....	.....	Atlanta.	Load.
VSP	.....	25855	B	10/5	.....	2	.....			
			B	10/5	.....	....	.....	.....	Cinti., O.	Cans.
MLT	.....	32803	B	10/5	.....	....	.....			
SOU	.....	27394	B	10/5	.....	1:45	.....			
IRCO	395	.....	..	10/5	.....	P	1:20 P. M.	.....	Cinti., O.	Gaso.
			B	10/5	.....	1:45	.....	.....	N. O., La.	Load.
PRR	55314	.....	B	10/5	.....	P	.....	.....	Atlanta.	Plat.
			B	10/5	.....	....	10:10 A.			
AGS	.....	12276	B	10/5	.....	....	.....			
LW	.....	32490	B	10/5	.....	....	4 P. M.			
SOU	.....	33806	B	10/5	.....	....	.....			
TRC	62501	.....	B	10/5	.....	....	.....	.....	Macon.	T. Cans.
PRR	285081	.....	..	10/5	.....	....	.....	.....	Lincoln.	PK.T. Mtl.
PRR	281774	.....	..	10/5	.....	....	.....	.....	———	———
PL	859458	.....	..	10/5	.....	....	.....	.....	———	———
PRR	275856	.....	..	10/5	.....	....	.....	.....	———	———
SWSCX	8087	.....	D	10/5	.....	5:00 P	5:15 P. M.	.....	Georgetown.	Cattle.

I certify that these cars were received as above:—

(Signed) J. F. CARROLL, *R. R.*
C. E. FISH, *Agent.*

Conductor's Freight Train Report.

Arrived 114 at 7:15 A. M., 10/6, 1914.

Caboose, Initial.	Loaded.	Empty.	From.	Date.	To.	Date.	Miles. Loaded.	Miles. Empty	Tons. Loaded.	Tons. Empty.	Seals. E. & N. end.	Seals. W. & S. end.
C&O	9228	.....	L	10/6	79	10/6	46000	.....	.....	nulse	37098	13401
B4	6968	.....	L	10/6	79	10/6	52000	.....	.....	"	79	.....
Erie	90300	.....	L	10/6	79	10/6	50000	.....	.....	"	37098	9200
FGE	17035	.....	L	10/6	79	10/6	72000	.....	.....	pears	"	19825
FGE	23050	.....	L	10/6	79	10/6	64000	.....	.....	fruit	"	34902
L&N	3820	.....	L	10/6	91	10/6	42000	.....	.....	nulse	"	29302
CNO&TP	15701	.....	L	10/6	98	10/6	42000	.....	.....	"	"	5700
NYMHH	85508	.....	L	10/6	67	10/6	50000	.....	.....	"	"	7500
Cof. Ga.	25047	.....	L	10/6	67	10/6	38000	.....	.....	"	"	3300
PRR	13025	.....	L	10/6	67	10/6	54000	.....	.....	"	"	1400
CNO&TP	12747	.....	L	10/6	67	10/6	50000	.....	.....	"	"	6300
SWSX	8087	.....	L	10/6	67	10/6	50000	.....	.....	"	"	3000
CNO&TP	15575	.....	79	10/6	114	10/6	.....	.....	.....	cattle	"	12902
LV	82098	.....	79	10/6	114	10/6	.....	.....	.....	nulse		
CP	206434	.....	79	10/6	114	10/6	.....	.....	.....	"		
CNO&TP	14649	.....	79	10/6	114	10/6	.....	.....	.....	"		
SR	15694	.....	79	10/6	114	10/6	.....	.....	.....	"		
CNO&TP	12348	.....	79	10/6	114	10/6	.....	.....	.....	"		
NCSTL	28573	.....	79	10/6	114	10/6	.....	.....	.....	"		
CNO&TP	15598	.....	79	10/6	114	10/6	.....	.....	.....	"		
CP	204554	.....	79	10/6	114	10/6	.....	.....	.....	"		
NCWL	14101	.....	79	10/6	114	10/6	.....	.....	.....	Tobc.		
COFG	6403	.....	79	10/6	114	10/6	.....	.....	.....	nulse		
B&O	103892	.....	79	10/6	114	10/6	.....	.....	.....	"		
CRIP	66277	.....	79	10/6	114	10/6	.....	.....	.....	salt.		
ACH	39365	.....	79	10/6	100	10/6	.....	.....	.....	beer.		
LEW	7628	.....	79	10/6	98	10/6	.....	.....	.....	.....	21	
CNW	101054	.....	79	10/6	91	10/6	.....	.....	.....	.....	17	
											12	

Endorsed on the back as follows: Freight conductor's train and tonnage report. Train No. 51, Section No. 3, Sheet No. 2. Kind of train, Cincinnati, Division. Revenue (State whether Revenue, Work, Light or Special). Show actual leaving and arriving time. Left Ludlow at 12:45 A. M., 10/6, 1914. Arrived at Danville at 7:15 A. M., 10/6, 1914. J. P. Carney, Conductor.

THIS PAGE BOUND

81 Engine No. 705. Form L to 114. Engineman, Riffe. Fireman, Tillett.

Instructions.

1. A report on this form must be made by conductor for each freight train run and mailed immediately upon completion of trip to the Car Accountant at Cincinnati. Do not detach part 1 from part 2.
2. Do not use ditto marks in any column.
3. If passenger cars are handled in freight trains, the movement should be clearly shown, and in addition to the same movement should be reported on the form used for passenger train equipment.
4. When necessary to use two sheets in reporting all cars handled, both must be fully filled out and fastened securely together.
5. Do not abbreviate initials; being careful to secure the proper initial of private line cars.
6. Be careful in reporting the initial of cars, where the initials are the same; as for instance, Illinois Central and Iowa Central. In this case the name should be written in full to enable proper entry of the record.
7. Where empty cars are handled under revenue billing, make the proper notation on the permanent report.
8. Show whether revenue, work, light or special on the face of the form as provided for under "Kind of Train."

82 Deposition of Frederick B. Edmands, on behalf of the defendants referred to on page — is as follows:

Deposition of Frederick B. Edmands.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RY. CO.

Depositions Taken by Agreement of Counsel to be Read on Behalf of Both Defendants in the Above Styled Case.

B. M. Lee being present representing plaintiff, and J. C. Bradley representing both defendants.

Signatures waived by consent of counsel.

Taken before me H. H. Grant, a Notary Public in and for Hamilton County, State of Ohio, at the Union Stock Yards Office, Cincinnati, Ohio, between 2 P. M. and 6 P. M., Friday May 21, 1915.

FREDERICK B. EDMANDS, of lawful age, being first duly cautioned and sworn, deposes and says as follows:

Direct examination.

Examined by J. C. Bradley:

Q. Give your name, age and residence?

A. Frederick B. Edmands; age 37; residence, Cincinnati, Ohio.

Q. What is your occupation?

A. Treasurer and General Manager of the Cincinnati Union Stockyards Co. and joint agent of the railroads at the Cincinnati Union Stockyards.

83 Q. Have you charge of the records that show the handling of the car SWSX 1690 inbound over the B. & O. Railroad, consigned to J. G. Leach, Georgetown, Kentucky; if so, please give what your records show in regard to the receipt and delivery of the car?

A. On the stable car line 1690 arrived at Cincinnati Union Stockyards at 1:35 a. m., October 3rd, 1915. Checked out 41 cattle into chute 77—checked out 41 cattle, no exceptions.

Q. To whom was the car consigned?

A. It was consigned to J. G. Leach, Georgetown, Kentucky. This car was reloaded into SWSCL 8087 at 4:20 P. M. October 3rd, 1914. Checked in 41 cattle in apparent good condition.

Q. During that interval what feed, if any, was given the cattle?

A. Fed 250 pounds of timothy hay.

Q. How do your records show the return of car 8087 to the Union Stockyards?

A. My records show the car 8087 was returned at 11:40 P. M. October 3rd, 1914. Checked out 40 live cattle and one dead cattle; unloaded at 11:56 P. M. into chute 81.

Q. Do your records show the reason for the return of these cattle?

A. They do not.

Q. Now what do your records show as to the further handling of car 8087, these 40 cattle?

A. They were again loaded into car SWSCL 8087 on October 5th, at 3:15 P. M. I said a moment ago that my records did not

84 show why they were returned; I now see a notation on the records, the car was returned by the Cincinnati Southern for Revenue Way Bill and health certificate from the B. & O. When these cattle were reloaded they checked in 39 cattle, one having died in the pen after unloading.

Q. During this second interval what food, if any, was given these cattle?

A. 500 pounds of timothy hay.

Q. Do your records show anything further in regard to the handling of these cattle at all?

A. Nothing that I can see. No.

Q. Do your records show any explainations about this shipment, either when it first came or when it was returned to you the second time?

A. It showed nothing when they were first received, but when they were returned the second time there was one dead cattle.

Q. Mr. Edmands, do you know anything of your own knowledge in regard to the rules and regulations of the Bureau of Animal Industry governing inspection?

A. Only in a general way.

Cross-examination.

Examined by Mr. B. M. Lee:

Q. Have you any record of the handling of this carload of cattle before they arrived in Cincinnati?

A. No, sir.

85 Q. Your records show that they were loaded twice in Cincinnati, in different cars?

A. They do, in the same car, Mr. Lee. They were transferred from the car in which they arrived and reloaded into car 8087, in which car they were returned the second time, and again reloaded into this same car.

And further deponent saith not.

Signature waived by consent of counsel.

(Signed) H. H. GRANT,
Notary Public in and for Hamilton Co., O.

My commission as Notary Public expires August 31, 1917.

Charges $5.00 paid by Defendant.

Certificate.

THE STATE OF OHIO,
Hamilton County, ss:

I, H. H. Grant, a Notary Public, in and for the County and State above named, duly commissioned and qualified, do hereby certify that the above named Frederick B. Edmands, was by me first severally sworn to testify the truth, the whole truth, and nothing but the truth and that the deposition was reduced to writing by me, and signature of witness was waived by consent respectively in my presence and was continued from day to day as above set forth, that said deposition was duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not Counsel, Attorney or relative of

86 either party or otherwise interested in the event of this suit, and was at the time of so taking said deposition a Notary Public in and for Hamilton County, Ohio.

In Testimony Whereof, I have hereunto set my hand and official seal this 21st of May, A. D. 1915.

H. H. GRANT, *Notary Public.*

Total cost for taking Deposition $5.00, received of the Defendants.

The interrogatories and cross-interrogatories of J. P. Carney, on behalf of the defendant, referred to on page — are as follows:

Interrogatories.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RAILROAD COMPANY.

Interrogatories to be Propounded to J. P. Carney, Conductor, Care C., N. O. & T. P. Railroad Company, Cincinnati, Ohio.

Q. Please give your name, age, residence and present occupation?

A. J. P. Carney, 86 Ash Street, Ludlow, Kentucky, age 53, Conductor freight train on the C., N. O. & T. P. Railroad Company.

Q. On October 6th, 1914, did you handle a shipment of stock in car S. W. S. C. No. 8087, out of Cincinnati to J. G. Leach, Georgetown, Kentucky. If so give the hour when this stock was loaded, when it left Cincinnati, on what train it left Cincinnati, and
87 when it arrived at Georgetown, Kentucky?

A. I did. I received this car at Ludlow, Kentucky, about 12:45 A. M. of the 6th; it was loaded at 5 P. M. October 5, 1914, at the Union Stockyards, Cincinnati, Ohio; we arrived at Georgetown, Kentucky, about 4 A. M. October 6th, 1914.

Q. When this car of stock was being handled by you did it receive any rough handling, if so what?

A. It did not.

Q. Did anything happen during the entire shipment from Cincinnati to Georgetown which could have caused or contributed to the death or injury of any of these cattle?

A. On receiving the train at Ludlow I discovered one cow dead in the car. I notified yardmaster Underwood of the same and I was instructed by him to take the car through to destination. On arriving at Georgetown I made another inspection of car and found cattle apparently in the same condition as I received them. Nothing happened in the territory that I covered, which was between Ludlow and Georgetown.

Q. In giving your answers please state whether you are testifying from your records?

A. From my records.

Cross examination waived.

B. M. LEE,
Att'y for Plaintiff.

(Signed) J. P. CARNEY, *Conductor.*

My fee for taking above deposition is $1.50 paid by Defendant.

(Signed) LOUIS TRAUB,
Notary Public.

88 *Certificate.*

STATE OF OHIO,
Hamilton County, ss:

I, Louis Traub, a notary public in and for the County and State aforesaid, do certify that the above and foregoing deposition of J. P. Carney was taken before me at my office, 53 Bodmann Building, in the City of Cincinnati, County of Hamilton, and State of Ohio, on the 2nd day of June 1915, upon the interrogatories hereto annexed; that said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, before giving his testimony; that the testimony of said witness was written by me in his presence on the typewriter, read and subscribed by him in my presence. I further certify that at the taking of the said deposition neither party was present in person nor represented by agent or attorney.

[SEAL.] (Signed) LOUIS TRAUB,
Notary Public, Hamilton County, State of Ohio.

Commission to Take Depositions on Interrogatories.

STATE OF KENTUCKY,
County of Scott, sct:

To any officer to take depositions in or out of this State:

You are hereby commissioned to take the depositions of
89 Drs. Timmons & Burnett upon the interrogatories and cross-interrogatories hereto annexed.

Given under my hand as Clerk of the Scott Circuit Court, this 25th day of May 1915.

(Signed) LEWIS FINLEY,
Clerk Scott Circuit Court.

The interrogatories and cross-interrogatories of A. J. Warken, on behalf of the defendant is as follows:

Interrogatories.

J. G. LEACH

vs.

B. & O. and C., N. O. & T. P. RAILWAY COMPANY.

The deposition of A. J. Warken, taken on behalf of the defendants in an action pending in the Scott Circuit Court, wherein J. G. Leach is plaintiff, and the B. & O. and C., N. O. & T. P. Railroad Companies are defendants.

The said A. J. WARKEN, having been first duly sworn, deposes as follows in answer to interrogatories:

Q. Please give your name, age, residence and present occupation?

A. A. J. Warken, 37, 3016 Colerian Avenue, Cincinnati, Ohio, Superintendent of Cincinnati Union Stock Yards.

Q. Are you in charge of the records of the B. & O. Railroad showing the time and date of receipt and delivery of shipments of stock handled by the B. & O. Railroad at Cincinnati, Ohio?

A. Only so far as relates to the Cincinnati Union Stock Yards.

90 Q. If so, please give from your records the entire handling of car 1690 S. W. S. C. containing 41 head of cattle billed from the National Stock Yards, East St. Louis, Illinois, on October 1st, 1914, to J. G. Leach, Georgetown, Ky.?

A. S. W. S. C. 1690 arrived at the Union Stock Yards at 1:25 A. M., placed at the platform at 1:35 A. M., unloaded at 1:38 A. M. October 3rd, 1914. They were placed in feeding pens, fed 250 pounds of hay and also were watered. They were loaded for Southern Railroad in the afternoon of October 3rd, in car S. W. S. X. 8087 and left the yards. They were returned to the yards October 3rd at 11:40 P. M. and were checked out 40 live cattle and one dead. They were also fed and watered on the fourth and fifth, 250 pounds each feed. We loaded 30 cattle; one died in the pen. The time for loading was 3:20 P. M. on the fifth. They were then shipped from our yards. I do not know the exact time.

Q. Please state whether this shipment of cattle arrived in Cincinnati in the usual and customary time for such shipments from East St. Louis, Illinois, to Cincinnati, Ohio?

A. I don't know.

Q. After the arrival of this load of stock was it possible to forward it to its destination at Georgetown, Ky., before the 36-hour limit for rest, food and water had expired?

A. I don't know.

Q. Were these cattle unloaded, rested and fed at Cincinnati? If so, were they fed and what feed was given them?

A. As stated in answer to question three, they were un-

91 loaded rested and fed October 3rd, being given 250 pounds of hay and sufficient water; this also happened on the 4th and 5th.

Q. Were these cattle transferred from car 1690 S. W. S. C., and if so, what car were they transferred to?

A. Transferred to car S. W. S. X. 8087.

Q. To what railroad were they then delivered and at what time and at what date?

A. They were delivered from the stock yards pens to the B. & O. October third.

Q. Was this car of cattle returned to the B. & O. a second time, if so by what road and at what time and on what date?

A. It was received at the Union Stock Yards via B. & O. October 3 at 11:40 P. M.

Q. Do your records show for what reason these cattle were returned or do you know of your own knowledge why they were returned?

A. The records do not show it, but I recollect that it was on account of no government certificate.

Q. What was then done with these cattle?

A. Fed, watered and rested.

Q. When were they finally delivered to the C. N. O. & T. P. Railroad?

A. I don't know.

Q. Do your records — that any of these cattle were dead, and what exceptions, if any, to this shipment do your records show?

A. Our records show that there were two dead, one died
92 after being returned, and one died in the pen while they were being fed, watered and rested.

(Signed) A. J. WARNKEN.

Certificate.

STATE OF OHIO,
Hamilton County, ss:

I, Buchanan Perin, a Notary Public in and for the county and State aforesaid, do certify that the above deposition of A. J. Warnken was taken before me at the Cincinnati Union Stock Yards in Hamilton, County, Ohio, on the first day of June, 1915, upon the interrogatories hereto annexed; that said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his testimony; that the testimony of said witness was written by me in his presence, read to and subscribed by the witness in my presence. I further certify that at the taking of said deposition neither party was present in person nor represented by agent or attorney.

In testimony whereof, I have hereunto set my hand and Notorial Seal this Second day of June, 1915.

[SEAL.] (Signed) BUCHANAN PERIN,
Notary Public in and for Hamilton County, Ohio.

My fees for taking this deposition, $5.00 were paid by the B. & O. S. W. R. R.

93 *Commission to Take Depositions on Interrogatories.*

STATE OF KENTUCKY,
County of Scott, set:

To any officer authorized to take depositions in or out of the State:

Your are hereby commissioned to take the deposition of Dr. Bertram of the Bureau of animal Industry, upon the interrogatories and cross-interrogatories hereto annexed.

Given under my hand as clerk of the Scott Circuit Court, this 25th day of May, 1915.

(Signed) LEWIS FINLEY,
Clerk of the Scott Circuit Court.

The interrogatories and cross-interrogatories of Dr. Bertram on behalf of the defendant, referred to on page — are as follows:

Interrogatories.

J. G. LEACH

vs.

B. & O. and C., N. O. AND T. P. RAILWAY COMPANY.

The Deposition of Dr. E. L. Bertram Taken on Behalf of the Defendants in an Action Now Pending in the Scott Circuit Court, wherein J. G. Leach is Plaintiff and the B. & O. and C., N. O. & T. P. Railroad Companies are Defendants.

The said Dr. E. L. BERTRAM, having been first duly sworn deposed as follows:

Q. Please give your name, age, residence and present occupation?

94 A. E. L. Bertram, age 41 years, Residence St. Louis, Mo. Present occupation—Veterinary inspector in charge of local office of Bureau of Animal Industry at National Stock Yards, Ill.

Q. In stating your occupation please state whether or not you are in the employ of the United States Government, and whether or not you have any employment in connection with the Bureau of Animal Industry?

A. Yes, I am in the employ of the United States Government as inspector in charge of the Bureau of Animal Industry.

Q. Did you on October 5th, 1914, receive a telegram from Dr. Burnett from the Bureau of Animal Industry, Cincinnati, Ohio, in regard to a certain shipment of 41 cattle from the National Stock Yards to J. G. Leach, Georgetown, Kentucky? If so file the original telegram, if you have it, if not, please identify the attached copy, if it is a correct copy, signed Burnett, and file it with this deposition?

A. I received a telegram on October 5th, 1914, from Dr. D. C. Burnett, inspector in charge Cincinnati, Ohio, and Exhibit 5 attached hereto is a correct copy of the original received by me.

Q. Did you send a telegram in reply? If so please identify the copy attached to these interrogatories if it is a correct copy, and file same with your deposition?

A. Yes, the copy marked Exhibit 6 attached hereto is a correct copy of the original sent by me.

95 Q. Did you inspect this shipment of cattle, and does this copy of your reply telegram correctly state the reason certificate was not attached?

A. I did not inspect the cattle myself but a member of my force did. My telegram correctly states the reason for not issuing the certificate at time of shipment.

Cross-examination:

Q. Did you inspect this shipment of stock before it was shipped from the National Stock Yards?

A. I did not, but a member of my force did.

Q. Were these cattle entitled to a certificate of health at the time you examined them?

A. Yes, sir.

Q. Did the B. & O. Railroad or any of its agents call upon you for, or demand of you a certificate of health for these cattle before they were shipped out of the National Stock Yards?

A. No, sir.

Q. Would you have delivered to the B. & O. Railroad Company or its agents such a certificate for these cattle if demand had been made on you before shipment?

A. Yes, sir.

(Signed) E. L. BERTRAM.

Subscribed and sworn to before me this 2nd day of June, A. D. 1915.

WILLIAM H. HEBENSTREIT,
Notary Public.

96 *Certificate.*

STATE OF ILLINOIS,
County of St. Clair, ss:

I, William Hebenstreit, a Notary Public, in and for the County and State aforesaid, do certify that the above and foregoing deposition of Dr. E. L. Bertram, was taken before me at the office of the Bureau of Animal Industry at National Stock Yards, County of St. Clair, State of Illinois, on the 2nd day of June, A. D. 1915, upon the interrogatories and cross interrogatories hereto annexed; that said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his testimony; that the testimony of said witness was

written by me in his presence, read to and subscribed to by him in my presence.

I further certify that at the taking of said deposition neither party was present in person nor represented by agent or attorney.

In witness whereof I have hereunto set my hand and Notorial Seal this second day of June, 1915.

WILLIAM H. HEBENSTREIT,
Notary Public.

Notary fees $2.50, paid by defendant B. & O. S. W. R. R. Co.

WM. H. HEBENSTREIT,
Notary Public.

97 Exhibits 5 and 6 referred to in the deposition of Dr. E. L. Bertram, are as follows:

EXHIBIT 5.

Telegram.

CINCINNATI, O., Oct. 5th, 1914.

Bertram Animal Industry, National Stock Yards, Ill.:

Advise if certificate issued to forty-one cattle J. G. Leach, Georgetown, Kentucky, about October 1st.

BURNETT.

EXHIBIT 6.

Telegram.

NAT. STOCK YDS., ILLS., Oct. 5, '14.

Burnett Animal Industry, Cin'ti, O.:

Forty-one cattle shipped Leach Georgetown, Ky. these yards October first native no certificate through oversight.

BERTRAM.

98 STATE OF KENTUCKY,
County of Scott, set:

I, Lewis Finley, Clerk of the Scott Circuit Court, do hereby certify that the foregoing eighty-two pages contain a true and correct copy of the record and proceedings had in the case of J. G. Leach, Plaintiff, against The Baltimore and Ohio Railroad Company and The Cincinnati and New Orleans and Texas Pacific Railroad Company, Defendants, as appears from the records of my office. Said case was lately pending in the Scott Circuit Court.

Given under my hand this fifth day of November, 1915.

LEWIS FINLEY,
Clerk Scott Circuit Court.

99 The transcript of evidence referred to is in words and figures as follows:

Scott Circuit Court.

J. G. LEACH, Plaintiff,

vs.

THE C., N. O. & T. P. and B. & O. R. R. Co.'s, Defendants.

Transcript of Evidence.

This cause coming on for trial, was tried on May 4 1915, at Georgetown, Kentucky, before the Hon. Robert L. Stout, regular judge, sitting, and a jury.

The plaintiff J. G. Leach, was represented by counsel, M. B. Lee, and the defendants, C., N. O. & T. P. and B. & O. railroad companies, were represented by counsel J. Lacy Bradley.

100 The plaintiff J. G. LEACH, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. B. M. Lee:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Did you ship some freight over the B. & O. S. W.—a load of calves—last October?

A. Yes, sir.

Q. Were you at East St. Louis, when these *cla*ves were actually purchased?

A. Yes, sir. I bought them there myself.

Q. What day did you buy these cattle?

A. The first day of October, 1914.

Q. How long have you been buying stock of that character and shipping from St. Louis to Georgetown?

A. Since 1908.

Q. Do you buy seldom or frequently?

A. I buy lots of stock—I ship straight for about three months, from July throughf the fall of that year.

Q. What route do you ship over and have you been shipping over?

A. I have been shipping over the B. & O. c/o the Q. & C. Georgetown B. & O. to Cincinnati, and over the Q. & C. from there to Georgetown.

101 Q. Tell the jury what is the usual customary time, for a shipment of a car load of stock from East St. Louis, to Georgetown.

A. I put them on a 36-hour limit, and whenever that runs out, they are fed and watered, but my stock generally leave there about

3:00 o'clock, like this evening or probably later and arrive in Cincinnati in the morning about 6:30. I have gone right on the stock train myself and switched from the Q. & C. by 12:00 o'clock and got in here about 5:00 to 6:00 and 7:00 o'clock or whenever that stock train goes out. It runs in here makes a trip in 26 or 27 hours, that is th- usual time and the only time that I have ever had it to fail. These cattle didn't arrive until the 6th day of the month and they left there th- 1st day of October and arrived here the 6th day of the month, and I shipped them in the same manner that I always do.

Q. How many were there?

A. There was 41 head of calves.

Q. What was the condition of the cattle when they arrived at Georgetown?

A. There were in a very bad condition, there was one dead and two short, and the others were in as bad a condition as you ever saw. I couldn't hardly get them to the field and one of them didn't get there. One of them laid down on the road and we couldn't move him and he got into the field that evening and died within a short time—two or three days.

Q. How many died after you got home?

A. Four in three or four days.

Q. That was s-ven that you lost altogether?

102 A. Yes, sir, seven two short in the car and one dead in the car, and four died in the field within a short time—I had Dr. Newman with them.

Q. What did you pay Dr. Newman?

A. Six Dollars.

Q. What were these cattle worth, or would they have been worth at Georgetown if they had been delivered in the usual customary way?

A. These cattle should have been worth $29 a head, $28 or $29—they were calves.

Q. When you first discovered their condition your cattle were in, when they arrived what steps did you take if any, to notify the Railroad Co.?

A. The cattle were unloaded when I drove to the pen, and I went on over to the yard and counted the cattle, and was looking for 41 and there was only 38, and I went to the car and there was one dead there, and of course I wouldn't have known that if I hadn't been expecting them. I counted them and found them short, and I went and looked up the agent Mr. Meyers and told him that my cattle was short three, and we counted them and I told him that I had a claim against the Railroad for damages, and that I was going to file claim against them.

Q. What did he say?

Objection by counsel for defendant.

Objection overruled to which ruling of the court defendants except.

A. He says all right.

103 Q. Did he say anything about requiring any further notice?

Objection by counsel for defendant.
Objection overruled to which ruling of the Court defendant excepts.

A. He said that is all that is necessary.
Q. What did Mr. Meyers say at that time as to whether there was any additional notice required.

Objection by counsel for defendant.
Objection overruled to which ruling of the court the defendant excepts.

A. He said for me to make out a claim as to the damages and write him a letter, and a bill of lading and put it in the letter to him of the shipment and with what information he had here and the scale tickets and what the cattle cost and told me to mail it to him through a letter.
Q. Did you do that?
A. Yes, sir; and he said he would attend to the matter after that.
Q. How long after they got here was it before you did that?
A. I don't remember.
Q. Before you gave him that information?
A. I don't remember, I think it was ten days maybe longer, a few days I know. The first time I had a chance to.
Q. Did you have a bill of lading at that time?
A. No, sir, when I shipped these cattle out of St. Louis, the B. & O. man—this bill — lading he usually give to me.

104 Objection by counsel for defendant to witness stating what the custom is, objection sustained.

Well, I went off and left there and had to write there for it. He didn't hand it to me and I went on out of the office without it, and I wrote the men of the firm that I bought the cattle from and to get me a bill lading and mail it to me as soon as possible and they didn't send it and I wrote the second time—my letter must have been misplaced or something—and about the 14th, 15th or 16th, they wrote me—mailed me a bill lading back and I attended to the matter as I have said.
Q. Did you give it to Mr. Meyers?
A. Yes, sir; and I stated the case to him and gave him the bill lading and scale ticket of what the cattle cost and the weight and my bill of freight.
Q. Was Mr. Meyers present and did he count the cattle, and see the condition they were in.
A. Yes, sir; he did, and I called his attention to it.
Q. How much do you think the other cattle that did not die were damaged.
A. I really wouldn't know, but I would put it at $5.00 a head, they were in such condition that they had to be looked after.
Q. What did you do to them and how long?
A. I had to have a veterinary and had to look after them closely

and it was some time before they *fot* into condition that I could sell them and I expected I could have got several more offers than I did.

Objection by counsel for defendant.

Objection sustained.

105 Six of them were in very bad condition and I think they were damaged $5.00 a head.

Q. How long after they got there and got on pasture, before they began to improve and get over the condition they were in when they arrived?

A. Some of them about ten days, and some of them did not get over it clear through until Christma*n*.

Q. If the stock had come through on the usual customary time, would there have been any such additional expenses as you had?

A. No, sir.

Q. Or any feed bill like you had in Cincinnati or anything of that kind?

A. No, sir; they were killed on the 36 hour limit, and before when they had been shipped on the 36 hours limit, they have always gotten here all right, and I never had any trouble with them and they got here in good condition.

Cross-examination.

By Mr. Bradley:

Q. I show you—is that the original contract shipment between you and the B. & O. with the B. & O.?

A. That looks like it.

Q. That is your signature?

A. It looks like it might be mine, there is a part of it torn off.

106 Q. That is the original I believe—that is your signature?

A. I suppose so, when I wrote them they sent me the contract——

Q. That is your signature?

A. I didn't sign but one contract one *one* shipment, yes, sir, that is the one they are supposed to hold.

Q. Is that the original?

A. I know they generally give me one like this.

Q. That is your signature?

A. Yes, sir; just a duplicate.

Q. I also show you that bill from Long, Harlin & Co.—is that Long, Harlin & Company the firm from which you bought the cattle?

A. Yes, sir.

Q. For $831.60.

A. I think that is correct, I think it was something like that. I have a bill of it.

Q. Get your bill and see if that is not correct?

A. There was an exchange of .80¢—my bill is $832.40.

Q. In addition to this bill then there was an exchange of .80¢?

A. Yes, sir; making $832.40.

Q. You spoke a while ago of a 36 hour release that is a copy of that isn't it, or rather the original signed by you?
A. Yes, sir. I guess so.
Q. That is your signature?
A. Yes, sir.

107 The above referred to bill, and release are filed herewith as a part thereof and marked J. G. Leach #1, and #2, respectfully, for identification.

Q. You stated that these cattle—when was it you say these cattle got over the damage caused by the delay?
A. Some didn't get through until after the winter, but the majority of them in about two weks, or something like that. Some of them got straightened up quicker than the others. These four that died died in three or four days after they landed.
Q. Did these cattle die within a week after the shipment started?
A. No, sir; the shipment started the first of October, and they landed here the 6th.
Q. Did all of them die within three or four days?
A. The cattle died somewhere about the 10th, I believe. They never done right, but I had to go on with them anyway. They died in three or four days, and a number of the others layed around, and layed around and didn't eat anything, and I didn't know what the outcome would be, but they didn't die.
Q. Were these cattle essentially the same kind of class of cattle?
A. Yes, sir; principally, because I bought them all at the same price.
Q. When did you sell these cattle—how long after they were received?
A. I sold them 17 of them somewhere about, I think about the 26th.
108 Q. 20th of what?
A. The 20th of October.
Q. Of that same year?
A. Yes, sir.
Q. You shipped the rest of them through the winter?
A. Yes, sir, the last one's were in better condition, and were straightened out better, and I sold the entire bunch last November, I think or long about the 1st of December, some of them I didn't sell until along in February, and another one of them in February had a a bad case of pneumonia, and I had to winter him in the stable.

Objection to answer by counsel for defendant, and motioned that witness' answer be taken out, which objection was sustained and the court orders statements taken out, to which ruling of the court plaintiff excepts.

Q. As these cattle recovered, as you thought from this delayed shipment, you sold them off and they had recovered and looked all right?
A. I sold what I could.

Q. Why is it that these cattle cost you $841.00 I mean $861.00 that is the 41 head cost you $20.00 a piece, how do you figure in asking in your petition $28 a piece?

A. I had the expense on the cattle, shipment and feeding for them besides my regular freight, and had my expenses up there, and all during the time and figuring these cattle up at about $23 a head what it would cost to get them here.

109 Q. $23 instead of $28, then?

A. Well, it was worth money, and I bought them for speculation, and I would — have bought them if I didn't think I could make some money on them, and sell them for more than I could buy them.

Q. Now in regard to the notice on this original contract for shipment provides, "That no claim for damages, which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court of the said shipper, unless a claim for such loss or damages shall be made in writing and verified by the affidavit of the said shipper or his agent, and delivered to the said general freight agent of the *said character,* said carrier at his office in the city of Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damages occurs upon the lines of connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." Did you give any such written notice?

A. I gave a written notice, I told you somewhere abouts the 17th or 18th, after I told Mr. Meyers about it and he told me that my claim was satisfactory.

Objection to the answer by the defendant.

Objection sustained.

Q. I ask you did you give any written notice to the general agent of the B. & O. R. R. Co. at Cincinnati, within five days?

A. No, sir.

110 Q. You didn't give any written notice at all, until this way bill—this contract came back from St. Louis, which was about the 14th or 15th—14 or 15 days afterwards?

A. Not that long I don't think, they arrived here on the sixth and it was somewhere about—well I don't remember, it was after I came back.

Q. But not within five days afterwards, was it?

A. No, sir.

Q. What did you say in this notice to Mr. Meyers—just what notice did you make, or give him?

A. I told him the condition of the cattle, and I told him in the letter that I wrote him just what I thought the damages was on them.

Q. I show you a letter here and ask you if that is the letter that you wrote him, if that is the one you refer to?

A. Yes, sir.

The letter above referred to is here with filed as part thereof and marked exhibit *lief $4* for identification.

Q. That notice is the only notice of any kind that you gave the R. R. Co., isn't it?

A. The only one that I gave, only the one that I gave at the time that they arrived to Mr. Meyers.

Q. And that was simply and oral statement of the cattle damaged?

A. I stated that I had a claim, and he could see the condition of the cattle, and he told me the steps to take.

Q. Mr. Meyers is the agent of the Q. & C. Ins't he?

A. Yes, sir.

111 Q. And you made the claim our against the B. & O.?

A. Yes, sir; this was the direction of what to do.

Objection to answer by counsel for defendant.

Objection overruled.

He told me that was the way to do it.

Objection.

Q. At East St. Louis, did you demand or see the government inspector there, when you shipped these cattle, and ask for a certificate of health from him, or any certificate of inspection?

Objection by counsel for plaintiff.

Objection sustained *wi* which ruling of the court defendant excepts.

Counsel for defendant avows that if the witness were permitted to answer he would state, and it would be so, that he did not make any demand from the government inspector for any health certificate.

Counsel for plaintiff avows that witness would state further that he never made any demand and that the R. R. Co. always secure the certificate of health.

A. No, sir; I didn't, I didn't make any demand.

112 Mr. SHROPSIRE, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lee:

Q. Where do you reside?

A. In Georgetown.

Q. Do you know J. G. Leach?

A. Yes, sir.

Q. How long have you known him?

A. A good many years.

Q. Did you see any cattle that he shipped from East St. Louis the first of last October?

A. I came upon him on the road driving some cattle.

Q. What was the condition of the cattle that you saw?
A. They seemed to be pretty thin and hollow and poor.
Q. Were any of them down?
A. One of them was down in the road.
Q. Where was it you met them?
A. I met them out here about two and a half or three miles out of the town.
Q. Was he coming towards his home?
A. Yes, sir.

113 Mr. R. WILLIAMS, after being first duly *d*worn, was examined and testified as follows:

Direct examination.

By Mr. Lee:

Q. Where do you live?
A. In Georgetown.
Q. Do you know Mr. Leach?
A. Yes sir.
Q. Did you see this bunch of cattle which he shipped in here in last October?
A. Yes, sir.
Q. Where did you see them first?
A. At Mr. Anderson's on the farm.
Q. What was their condition?
A. They were in pretty bad condition.
Q. Pretty bad condition?
A. Yes, sir.
Q. Do you know whether any of them died or not?
A. Yes, sir, four.

Cross-examination.

By Mr. Bradley:

Q. Now soon after you got them out there?
A. Just a few days.

114 Mr. HALL, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lee:

Q. Do you live near Mr. Leach's place?
A. I did live there.
Q. Did you ever see this bunch of cattle, which he shipped from East St. Louis, the first of last October?
A. Yes, sir.
Q. Where did you first see it?
A. On Mr. Anderson's farm.
Q. What condition were they in when you saw them?

A. They were in pretty bad condition, I thought.
Q. What was the trouble with them, were they fat or poor?
A. Well, they were not fat, they looked very bad.
Q. Do you know whether any of them died after they got there?
A. There was four dead the morning I was there.
Q. Did you see them dead in the pasture?
A. Yes, sir.

115 T. G. SPRADLING, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lee:

Q. Your name is T. G. Spradling?
A. Yes, sir.
Q. Where do you live?
A. Out here near Oxford.
Q. You are a farmer?
A. Yes, sir.
Q. Did you see the bunch of cattle Mr. Leach shipped in here from East St. Louis about the first of last October—from East St. Louis?
A. Yes, sir.
Q. Where did you see them?
A. About a mile and a half out of town.
Q. Did you pay any particular attention to them?
A. Yes, sir; I stopped in the gate and was there looking at them with a view of buying them.
Q. What condition were they in?
A. They were very thin.
Q. Thin—?
A. Yes, sir; looked to be very thin and weak—about as thin a bunch of cattle as I ever looked at. I didn't want to buy any of them after I looked at them.

Q. Did you see them any more after that?
116 A. No, sir; not for awhile. Along in the Winter I looked at fifteen or twenty of them.
Q. Do you know whether any of them died or not?
A. No, sir—I heard people say they died, but I never seen them—never seen any of them.

It is here agreed that a witness for the plaintiff, one Mr. Watson, may be introduced as a witness out of order as he is not present in the Court room at this time.

Mr. ZACH L. MYERS, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lee:

Q. What position do you hold with the railroad company?

117 A. I am joint agent for the C., N. O. & T. P. and the Southern Railroad Company.

Q. How long have you been stationed at Georgetown?

A. Seven and a half years.

Q. Do you know J. G. Leach?

A. Yes, sir.

Q. Has he been shipping over your road from East St. Louis for a number of years?

A. Ever since I came to Georgetown.

Q. And over the B. and O.?

A. Yes, sir.

Q. Do you know what the usual time is for shipments to get from East St. Louis to Georgetown?

A. I don't remember the exact schedule but it is on a thirty six hour limit.

Q. When this particular shipment of stock arrived on October 6th, 1914, did you see the cattle and see the condition they were in?

A. Yes, sir.

Q. What condition were they in?

A. In very bad condition.

Q. Were any of them dead when they arrived?

A. One was.

Q. In the car?

A. One of them.

Q. Did you go to the yards or pens and count the cattle and see the condition they were in, at Mr. Leach's request, when the cattle arrived and were unloaded?

118 A. Yes, sir, I did.

Q. He told you, then, about the damaged condition of the cattle?

A. Yes, sir.

Q. And you told him about writing and making getting the bill of lading and making out his claim?

A. He took—I told him he would have to get a notice and an expense bill and a freight bill and also his bill for the amount of damages and file them.

Q. You did know the condition of the cattle at the time they arrived?

A. Yes, sir.

Q. You saw them yourself?

A. Yes, sir; and it was the undertaking between Mr. Leach and myself that there would be a claim.

Q. In this letter which has been introduced by Mr. Leach—that is the one received by you from Mr. Leach?

A. Yes, sir; and filed with the claim papers.

Cross-examination.

By Mr. Bradlye:

Q. You have no connection with the B. & O.?
A. No, sir.
Q. You are no employe of the B. & O.?
A. No, sir.
Q. You are simply agent for Q. & C.?
119 A. Yes sir.
Q. And this letter which is filed here was the only written notice of any kind ever presented to you?
A. Yes, sir.

Redirect examination.

By Mr. B. M. Lee:

Q. I will ask you — No, sir, step aside, Mr. Meyers, I don't wish to ask you any further.

Mr. J. G. LEACH, upon being recalled was examined and testified as follows:

Direct examination.

By Mr. Lee:

Q. I will ask you what the condition of these cattle was when they left East Saint Louis?
A. In perfect condition—I wouldn't have bought them if they hadn't been.
120 Q. About what age cattle were they?
A. About six months to a year, I guess.
Q. Was forty-one head of cattle unusual or crowded in a car of that kind?
A. No, sir; I wouldn't think so the maximum capacity is twenty thousand pounds and these cattle didn't weight anything like that.

End of Plaintiff's testimony, plaintiff announced closed.

At the end of plaintiff's testimony the defendants, by counsel, moved the Court to instruct the jury peremptorily to find for defendants and each of them, and the Court, upon being advised, overruled said motion, to which ruling of the Court the defendants and each of them object and except.

The only evidence introduced by the defendants was the reading of deposition of E. B. Padgett, O. C. Benton, C. G. Davis, James P. Kennedy, A. J. Warnker, D. Bertram, S. O. Parker, F. B. Edwards and J. P. Carney.

At the conclusion of the reading of the above depositions the defendants renewed motion for peremptory — which motion was overruled to which ruling of court defendants except and each
121 of same object, etc.

122 At the conclusion of all the testimony the defendant, C., N. O. & T. P. R. R. Company, by counsel, moved the Court to peremptorily instruct the jury to find for the C., N. O. & T. P. R. R., and the court, being advised, sustained said motion, to which ruling of the Court the defendant, B. & O., by counsel objects and excepts.

At the conclusion of all the testimony the defendant, B. & O. Railroad Company, by counsel, moved the court to peremptorily instruct the jury to find for the B. & O., and the court being advised, overruled said motion; to which ruling of the Court the defendant, B. & O. Railroad Company by counsel objects and excepts.

The defendant, B. & O. Railroad Company by counsel, objects and excepts to the instructions and each of same given by the Court.

123 STATE OF KENTUCKY,
County of Scott:

I, Sterling B. Thornton, official stenographer for the Scott Circuit Court, do certify that the foregoing transcript is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected and all exceptions, Objections and avowels, concerning the same, as well as all papers and exhibits offered to be or used as evidence in the trial.

STERLING V. THORNTON,
Off. Sten'r Scott Circuit Court.

Approved:

ROBT. L. STOUT, *Judge.*

124 The Court of Appeals of Kentucky rendered the following judgment or mandate on the 22nd day of November, 1916:

BALTIMORE & OHIO RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Appeal from the Scott Circuit Court.

The Court being sufficiently advised overruled the appellant's motion for an appeal.

It is therefore ordered that the judgment of the lower Court be affirmed and that the appellee recover of the appellant 10% damages on the amount of the judgment *supseseded* herein. Which is ordered certified to the lower court.

It is further adjudged that the appellee recover of the appellant its costs herein expended.

(The Court did not deliver any opinion.)

Be it remembered that thereafter to-wit, January 3rd, 1917, the following order was entered in the Court of Appeals of Kentucky:

BALTIMORE & OHIO RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Came appellant by counsel and filed herein a motion and petition for re-hearing and filed motion to set aside the order of Nov'r 22nd, 1916 and moved the Court to grant an appeal and reverse the judgment of the Lower Court, motions submitted.

The Motion referred to in the foregoing order is as follows:

125 Filed Dec. 27, 1916. R. W. Keenon, C. C. A.

Court of Appeals of Kentucky.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Motion.

The Baltimore & Ohio Southwestern Railroad Company moves the court to set aside the order herein entered November 22, 1916, and enter an order sustaining its petition for an appeal and reversing the case in accordance with the decisions of the Supreme Court of the United States in—

Northern Pacific R'y Co. v. Wall, 241 U. S. 87.
Cincinnati, New Orleans & Texas Pacific R'y Co. v. Rankin, 241 U. S. 319.
Georgia, Florida & Alabama R'y v. Blish Milling Co., 241 U. S. 190.
Louisville & Nashville R. R. Co. v. Croan & Griffin (on appeal from this Court, decided October 23, 1916).

GIBSON & CRAWFORD,
Attorneys for Appellant.

126 The petition for re-hearing referred to in the foregoing order is in words and figures as follows:

127 Court of Appeals of Kentucky.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Petition of Appellant for Rehearing.

In filing this petition and the motion that accompanies it, counsel has in mind Rule 20 adopted May 26, 1914, by this court with reference to petitions for rehearing in cases involving less than five hundred dollars, and his reason for filing this petition is that he feels it is his duty to the Court, as a member of its bar, as the question is a Federal one, to call attention to four late cases decided by the Supreme Court of the United States, which were not before this court at the time of the decision in this case.

The sole question involved arises out of a shipment on a bill of lading covering an interstate shipment, and is, therefore, a Federal question under the Carmack Amendment.

Subsequent to the submission of this case on January 26, 1916, the Supreme Court decided four cases which fully cover the ground presented in this case, and as the law of interstate shipments
128 is not what this Court may decide, but what the Supreme Court decides, counsel does not feel that this court would wish to have a judgment apparently against all those cases on a Federal question go to the Supreme Court without this Court's attention having been called to them.

The first three cases are:

Northern Pacific R'y Co. v. Wall, 241 U. S. 87; decided April 24, 1916.

Cincinnati, New Orleans & Texas Pacific R'y Co. v. Rankin, 241 U. S. 319; decided May 22, 1916.

Georgia, Florida & Alabama R'y v. Blish Milling Co., 241 U. S. 190; decided May 8, 1916.

The Wall case sustains the validity of a livestock stipulation such as is involved in this case, and holds that such a provision, when interstate, is to be construed in the light of the provisions of the Carmack Amendment, and that where such question is involved, it is a Federal question.

The case of Railway Co. v. Rankin, supra, is to the same effect, and holds that rights and liabilities of parties to an interstate shipment by rail depend upon Acts of Congress, the bill of lading, and common-law principles as accepted and applied in Federal tribunals, and, further, that the parties are bound by the recitals in the bill of lading.

The Blish Milling Company case, supra, we respectfully submit, together with the two cases above referred to, conclusively settles the

question presented in this case contrary to the ruling of the
129 Circuit Court by specifically holding that where a shipment is made in interstate commerce under a bill of lading, the provisions of the bill of lading can not be waived, the court saying, in an opinion by Mr. Justice Hughes (page 197):

"It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chi. & Alt. R. R. v. Kirby, 225 U. S. 153, 166; Kansas Southern Ry. v. Carl, supra; A., T. & S. F. Ry. v. Robinson, 233 U. S. 173, 181; Southern Ry. v. Prescott, supra."

The fourth case decided by the Supreme Court was Louisville & Nashville R. R. Co. v. Croan & Griffin, on error from this Court, and the same question was involved. The decision of this court was rendered March 1, 1916, and a writ of error was prayed and granted to the Supreme Court, and the cause, numbered 453, was submitted on briefs at the beginning of the October, 1916, term of the Supreme Court, and the judgment of this court reversed in a per curiam opinion dated October 23, 1916, which reads as follows:

"No. 453, Louisville & Nashville Railroad Company, plaintiff in error, v. C. L. Croan, et al. In Error to the Court of Ap-
130 peals of the State of Kentucky. Per curiam: Judgment reversed with costs upon the authority of Northern Pacific Railway Co. v. Wall (241 U. S. 87); Cincinnati & Pacific Ry. v. Rankin (241 U. S. 319)."

We understand that the mandate of the Supreme Court in the above case was sent to the clerk of this Court, but are uncertain as to whether it has as yet been filed.

In view of the fact that the question presented in this case has been thoroughly considered by the Supreme Court and decided adversely to the decision rendered in this case in the court below, we feel that upon petition for rehearing and the presentation of these cases to the court as a matter of record, the order entered November 22, 1916, denying our motion for an appeal will be set aside, the appeal granted, and the cause reversed.

Asking that this be done, this petition is

Respectfully submitted,

GIBSON & CRAWFORD,
Attorneys for Appellant.

131 Be it remembered that thereafter, to-wit, January 26th, 1917, the following order was entered in the Court of Appeals of Kentucky.

BALTIMORE & OHIO RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Order.

The Court being sufficiently advised, the petition for re-hearing is overruled and response delivered.

The response referred to is in words and figures as follows:

132 Court of Appeals of Kentucky, January 26th, 1917.

BALTIMORE & OHIO RAILROAD COMPANY, Appellant,

vs.

J. G. LEACH, Appellee.

Appeal from Scott Circuit Court.

Response to Petition for Rehearing by Judge Hurt Overruling.

This action was brought in the Scott circuit court, by the appellee, J. G. Leach, against the appellant, Baltimore & Ohio Railroad Co., and the Cincinnati, New Orleans & Texas Pacific Railway Co., jointly, to recover from them, the damages alleged to have been sustained by the appellee from the negligence of the two railroad companies in unreasonably delaying the transportation of forty one head of cattle from East St. Louis Illinois, to Georgetown, in
133 the state of Kentucky, and by negligently failing to properly water and feed them, while on the way. The negligence resulted, as is alleged, in the failure to deliver two of the cattle, they having died before the arrival at Georgetown, and in the death of one between Cincinnati and Georgetown, and the death of four others, within three or four days after their arrival at Georgetown, and injuries to the remaining ones from starvation and want of attention while being transported. The trial of the action resulted in a judgment against the appellant in favor of appellee, who was the owner and shipper of the cattle, for the damages, and the judgment was affirmed upon appeal to this court.

The appellant, by its petition, seeks a rehearing in this court upon its contention, that the shipment was an interstate transaction, and that the bill of lading contained the contract between the shipper and the appellant, which was the initial carrier, and that the meaning and construction of the contract is a Federal question, and the construction to be placed upon such a contract by the courts of Federal jurisdiction is controlling. The soundness of this contention is conceded. It appears from the answer of the appellant filed

in the action in the court below and which averment was not traversed, the bill of lading contained the following stipulation.

134 "That no claim for damages, which may accrue to the said shipper under this contract, shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent and delivered to the general freight agent of said carrier at his office in Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if and loss or damage occurs upon the line of connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper office or agent of the carrier on whose line the loss or injury occurs."

The Federal statute, known as the Carmack Amendment, to the Interstate Commerce Act was invoked and it was plead that the bill of lading was made and delivered to the shipper, under the provisions of that statute; and further, that the appellee did not within five days deliver a claim for damages in writing, verified by his affidavit or that of his agent, to the general freight agent of appellant at Cincinnati, Ohio, or to the connecting carrier, the Cincinnati, New Orleans & Texas Pacific Railway Co. These averments of

135 answer were undenied, but, instead, the appellee replied in avoidance of them, and alleged in a reply that immediately and upon the same day of the delivery of the cattle at Georgetown, Kentucky, he called upon the station agent of the Cincinnati, New Orleans & Texas Pacific Railway Co., at Georgetown, and had him to inspect the cattle and notified him of the failure to deliver two of the cattle and that he intended to make a claim for damages; that said agent inspected the cattle and then and there waived the requirement of the contract to file a written claim for damages within five days, verified by his affidavit, etc., but directed him to make out his claim for damages and to write a letter to him stating his account for the damages and enclose it with a copy of the bill of lading, and that would be all that was necessary for him to do in order to secure the damages, and that relying upon the waiver, he did not within the time required by the contract, make out the claim, verify it and file it as required by the contract, but relied upon the directions of the agent and did as directed by him, and that the appellant thereby waived the requirement of filing a written claim for damages, verified by his affidavit, with its general freight agent within five days. The appellant did not demur to the reply containing the allegations as to the waiver, as above stated, but made an issue thereon by traversing it of record by agreement with appellee, as is provided by the Civil Code.

136 At the conclusion of the evidence for appellee and at the conclusion of all of the evidence, the appellant moved the court to direct a verdict for it, but the motions were overruled in both instances. The court was not requested by appellant to instruct the jury upon the issue made as to the alleged waiver, and hence did not instruct the jury as relating to that issue. Under subsection 5, of Section 317, of the Civil Code, however, it is not the duty of

the court to give instructions in a civil case, unless a party offers an instruction in writing, bearing upon the issue upon which the instruction is desired, and a party cannot complain that an instruction has not been given, when he has not requested the court to do so—L. H. & St. L. R. R. Co. v. Roberts, 144 Ky. 820; L. & N. R. R. Co. v. Harrod, 115 Ky. 877; C., N. O. & T. P. Ry. Co. v. Curd, 22 R. 1222; Nicola Bros. v. Hurst, 28 R. 87, and other cases holding similarily. As a matter of fact, there was sufficient evidence in support of appellee's claim of the waiver having been made to have submitted the issue to the jury, and to have sustained a verdict of the jury that it had been made, if, as a matter of law, the agent of the Cincinnati, New Orleans & Texas Pacific Railway Co., at Georgetown, Kentucky, was authorized to waive the requirement in the contract. Hence, it appears that with relation
137 to the waiver in question, that the appellant has no just cause of complaint, unless the court was in error in holding, that the agent of the connecting carrier at the destination of the shipment was authorized to waive the requirement of the contract which had been entered into between the appellant, as the initial carrier, and the shipper with relation to the time and manner in which and to whom a claim for damages should be made.

The appellant having failed to request the court to instruct the jury, relating to the waiver, now has no ground of complaint, unless the trial court was in error, in overruling its motion for a direct verdict, at the conclusion of the evidence.

It is contended in the petition for a rehearing, that the parties to a contract, such as is embraced in a bill of lading issued under the published tariffs and regulations of a railroad company covering a shipment of goods or cattle from a point in one state to a point in another, under the provisions of the Federal statute above mentioned, where the bill of lading is issued by an initial carrier, and the destination of the shipment must be reached over a con-
138 necting carrier, that the parties, as a matter of law, can not make a waiver of any requirement of the contract; that the Federal act enters into it and gives to it the same force as a statute. It must be conceded, of course, that parties in making a contract are presumed to have in contemplation the existence of the laws in force where the contract is made, and the contract must be construed in the light of such laws, and while the laws will enforce the provisions of the contract, if adhered to by the parties, yet, they may ordinarily rescind or by further agreement one party may waive a provision which is solely for his benefit. It may be said, however, that the answer of appellant does not show that the bill of lading, in the instant case, was issued in accordance to or under the published tariffs or regulations of appellant. There is no direct averment nor proof, that the bill of lading was issued in compliance to the provisions of the interstate commerce act. Passing this question, however, it may be conceded that the rights and liabilities of a party to an interstate shipment depend upon the acts of Congress, the bill of lading and the common law principles, as accepted and applied in Federal tribunals. C., N. O. & T. P. Ry.

Co. v. Rankin, 241 U. S. 319, M. K. & T. Ry. Co. v. Harri-
139 man Bros., 227 U. S. 657; Adams Express Co. v. Croninger,
226 U. S. 491; Northern Pacific Ry. Co. v. Wall, 241 U. S.
87; Georgia, Florida & Alabama Ry. v. Blish Milling Co. 241 U. S.
190. The provisions in a contract governing an interstate ship-
ment, which requires the shipper to make a claim for damages by
notifying the agents of the connecting carrier, before the cattle are
removed from the point of destination and where received, or to
make a claim in writing within a specified time and to file it with
some designated agent of the initial or connecting carrier, as a
condition precedent to his right of recovery, is a provision made for
the benefit solely of the carrier, and under the common law such a
provision of a contract might be waived by the carrier. In M. K. &
T. Ry. Co. v. Harriman Bros. 227 U. S. 657, supra, it was held,
that the validity of any stipulation, in a contract for an interstate
shipment, which involved the construction of the interstate com-
merce act, and the validity of any limitation, upon the liability
there imposed, was a Federal question and should be determined
under the general common law. The opinion further said:

"The liability imposed by the statute is the liability imposed by
the common law upon a common carrier, and may be limited
140 or qualified by special contract with the shipper, provided
the limitation or qualification be just and reasonable, and
does not exempt from loss or liability due to negligence."

In Hutchinson on Carriers, Vol. 1, Section 444, it was stated as
the rule of the common law, that a condition in a contract between
a carrier and a shipper, which required that notice of claim must
be presented within a given time, that the carrier may, either ex-
pressly or by conduct inconsistent with an intention to rely upon
it, waive the benefit of the condition. In Howard & Callahan v.
I. C. Ry. Co., 161 Ky. 783, and where the identical question, here
being considered, was under a consideration, it was expressly held
by this court, that such a clause, in a contract for interstate ship-
ment, between the shipper and the carrier, could be waived by the
carrier. In that case the court said:

"In Railroad Company v. Kirkham, 63 Kan. 255; Kidwell v.
Oregon Short Line R. Co. 208 Fed. Rep. 1; Clegg v. St. Louis R.
Co. 203 Fed. Rep. 971, there are expressions to be found
141 indicating that the court was of the opinion that a clause
like the one here in question could not be waived; but we
think an examination of these cases will show that these courts
really said that the facts in the cases under consideration did not
amount to a waiver, and not that a condition like this could not be
waived under any circumstances. * * * But whatever view other
courts may entertain of this question, it is our opinion that the
condition in the contract could be waived." * * *

In the same opinion, it was said:

"In Hinkle v. Southern Ry. Co., 126 N. C. 932; A. T. & S. F.
Ry. Co. v. Wright, 78 Kan., 94; 95 Pac. 1132; Lasky v. Southern
Express Co., 92 Miss. 268; 45 S. O. R. 689; Adams v. Colorado &
Southern Ry. Co. 49 Col. 475; 36 L. R. A. (N. S.) 412; Hudson v.

Northern Pacific Ry. Co., 92 Iowa, 231; 54 A. M., (S. T.) 550; Gilliland v. Southern Ry. Co., 85 S. C. 26; 27 L. R. A. (N. S.) 1106; A. T. & S. F. Ry. Co. v. Robinson, (Okla. not reported) 129 Pac. 20; St. Louis & San Francisco R. R. Co. James, (Okla., not reported) 128 Pac. 279, it was held that a provision like the one embodied in this contract of carriage could be waived, and upon principle there seems no good reason why this character of condition in a contract for carriage can not be waived."

The same view was held by this court in the case of C., N. O. & T. P. Ry. Co. v. Smith & Johnson, 165 Ky. 235. Under these opinions, there appears to be no reason why we should depart from the doctrine there held, until it shall be determined by the Federal tribunals, that the condition in a contract for the interstate shipment of goods, that requires notice to be given within a specified time, as a condition precedent to a right of recovery, can not be waived by the carrier. Four decisions of the Supreme Court of the United States, and which have been rendered since the submission of the instant case, in this court, are referred to by the appellant, and it is insisted by it, that these opinions determine the question contrary to the opinion of this court in I. C. R. R. Co. v. Howard & Callahan, supra and C., N. O. & T. P. Ry. Co. v. Smith & Johnson, supra. The cases to which reference is made are Northern Pacific Ry. Co. v. Wall, 241 U. S. 87; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin, 241 U. S. 319; Georgia, Florida & Alabama Ry. v. Blish Milling Co. 241, U. S. 190; and Louisville & Nashville Railroad v. Cronan & Griffin, decided by the Supreme Court of the United States on October 23rd, 1916. It however, does not appear that the opinion in either of these cases is conclusive of the question under consideration, here. In Northern Pacific Ry. Co. v. Wall, supra, there was shipment of cattle from Montana to Chicago, Ill., and in the bill of lading there was a stipulation, which provided that the shipper could not make any claim for damages, unless before moving the cattle from the point of destination or mingling them with other cattle, he should give notice of his claim to some officer or station agent of the company. The Northern Pacific Ry. Co. was the initial carrier, but the delivery of the cattle at Chicago, was made by the Burlington Company, which was a connecting carrier. Notice in writing of the shipper's claim was not given before the cattle were removed from the place of destination and mingled with other stock and sold. The shipper instituted the suit in a court of original jurisdiction in Montana, and the trial court instructed the jury, that the stipulation in the contract as to notice of the claim for damages, before the stock was removed from the place of destination or mingled with other stock, was binding upon the plaintiff, and that he could not recover, unless the defendant, Railroad Company, had, expressly or impliedly, by its conduct, waived the giving of the notice in accordance with the provisions of the contract. The Supreme Court of the state of Montana held that the stipulation was unreasonable and inoperative, because no officer or agent primarily employed by the Northern Pacific Company was accessible

at that place of destination, and the contract excluded the giving of the notice to the agents of the connecting carrier. The Supreme Court of the United States held that the construction placed upon the contract by the Supreme Court of Montana was erroneous, in that it failed to give proper effect to the Carmack Amendment, because it held that the contract could not be complied with by the shipper, by giving notice to an officer or station agent of the Burlington Company, the delivering carrier, instead of the initial carrier. The court in its opinion said:

"Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purposes of completing the transportation and delivering the property. * * *

145 The shipment was to pass over both roads in reaching destination; the delivery at that place was to be made, as in fact it was, by an officer or station agent of the connecting carrier; and the stipulated notice was to be given before the cattle were removed from the place of destination or mingled with other stock, so that while, it was yet possible from an inspection of them to ascertain whether the claim of injury, if any, was well founded. In these circumstances, it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it in view of its relation to the initial carrier should operate as notice to the latter."

Hence, the court in this case held that such a stipulation in a contract for an interstate shipment to be valid, but held that the notice might be given to the agent of the connecting carrier, which makes the delivery, as the connecting carrier for the purposes of the transportation and delivery was the agent of the initial carrier, and although the trial court had held that such a stipulation in the contract might be waived, the Supreme Court in its opinion, does not reverse the judgment upon that ground, or hold that

146 the stipulation could not be waived, but based its reversal upon the fact that the Supreme Court of Montana had held that the condition was inoperative and could not be complied with by giving notice to some officer or station agent of the Burlington Company.

In Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankins, supra, the question of the power of a carrier in an interstate shipment to waive the requirement in a contract for an interstate shipment that the shipper must give notice of a claim for damages, within a specified time was not a question for decision nor adverted to nor determined by the court. The principle declared in that opinion was, that the determination of the rights and liabilities of the parties to an interstate shipment and the construction and validity of the contract, under which they acted, depended upon the acts of Congress, the bill of lading and the common law rules as accepted and applied in Federal tribunals, and in support of that doctrine referred to and cited other authorities.

In Louisville & Nashville Railroad v. Cronan & Griffin, supra,

the question of the right of a carrier of an interstate shipment to waive the conditions in the contract which required notice to the agents of the initial or connecting carrier before the removal
147 of stock from their point of destination as a condition precedent to the right of the shipper to recover for loss or damage, was not in anywise involved in the action. There was no contention that any waiver had been made in that case and the decision of the court related solely to the validity of such a stipulation as is above described in a contract for an interstate shipment.

In Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., supra, the question of the waiver of a stipulation in the contract as to the giving of the notice of the claim for damages as a condition precedent to the right of recovery by the shipper was not under consideration and was not determined. In that case, the question, which was under consideration, chiefly, was whether the notice and claim required under the contract had been given, and the Supreme Court held, that as a matter of fact, the notice was given within the time specified in the contract. It seems that the view taken of the matter by the shipper and by the Supreme Court of Georgia was, that the notice of the claim for damages had not been given, and to avoid the requirement in the contract that it should be given, the shipper was insisting that his form of action, which was in trover, made it unnecessary that he should have
148 given such notice. The court in discussing that view of the case made use of the language relied upon by the appellant as determining that such a condition in a contract of interstate shipment can not be waived by the parties. The effect of a direct waiver of such a condition by the party in interest and by his agreement was not before, nor considered by the court. Hence, there does not seem any justification for us to change the rule of this court relating to such question, and which has heretofore been declared and established, as the language used in the opinion is not sufficiently decisive nor near enough related to the question under consideration here to be regarded as controlling it.

On December 4th, 1916, the case of Chesapeake & Ohio Ry. Co. v. McLaughlin, was considered by the Supreme Court of the United States. In that case, the contract between the initial carrier and the shipper was identical with the stipulation in the contract, in the instant case, relating to the notice of the loss or damage and the time in which and the party to whom the notice was required to be given. In that case it was held that the stipulation was a
149 valid one, the court, however, saying in its opinion:

"It conclusively appears that McLaughlin did not present a verified claim to the carrier's agent, as provided by the contract. Upon its face, the agreement seems to be unobjectionable, and nothing in the record tends to establish circumstances rendering it invalid or excuse failure to comply there with."

The court, also cites the opinions, above referred to, as rendering unnecessary any further discussion of the reason for the conclusion it arrived at. It seems, however, that the rule there declared was, that such a stipulation in a contract was valid and binding

upon the shipper, unless there was something in the record showing circumstances, which rendered it invalid or to excuse failure to comply with it. If such a condition in such a contract has the inflexibility of a statute, and the party for whose benefit, solely, it exists, is powerless to waive, it can readily be seen, that, in many instances, the condition would be so unreasonable, as to deny the shipper all remedy, because, in all probability, he would not be able to learn which one of the carriers, over which the shipment came to him, had caused the loss or injuries, until more than
150 five days had elapsed, and if he made a mistake in giving notice of his claim for damages to one of the carriers, which had not caused the loss or damage, he would be without remedy. Construing the contract, however, as in Northern Pacific Ry. Co. v. Wall, supra, to the effect, that such a stipulation, in such contract, could be complied with, by the shipper, by giving notice to the agents of the connecting carrier at the point of delivery would make the stipulation fair and reasonable, in most instances, to both parties. In I. C. R. R. Co. v. Howard & Callahan, supra, this court held that the agent, to whom notice of the loss or damages should be given by the requirements of the contract, had authority to waive the condition. Hence, we conclude that in the instant case, that the agent of the delivering carrier, at the point of delivery, was the agent of the initial carrier for the purposes of the delivery, and as such, if notice in writing, verified by the affidavit of the shipper, of the claim for loss or damages, had been given to him within five days after delivery of the shipment, it would have been a fulfillment of the requirements of the contract, and hence such agent was authorized to waive the stipulation in the contract as to the time within which the claim for damages should be
151 made, and the manner in which it should be made, and such waiver would excuse failure to comply with it, as stated in Chesapeake and Ohio Ry. Co. v. McLaughlin, supra.

The petition for rehearing, as well as the written motion filed to set aside the judgment, which could only have the effect of a petition for rehearing, are overruled.

Gibson & Crawford, Louisville, Ky.; Bradley & Bradley, Georgetown, Ky., for appellant.

B. M. Lee, for appellee.

R.

[Endorsed:] Jan. 26/17. B. & O. Ry. Co. v. Leach.

152 STATE OF KENTUCKY,
Court of Appeals:

I, Rodman W. Keenon, Clerk of the Court of Appeals of the Commonwealth of Kentucky certify that the foregoing is a true and correct copy of the record and orders rendered by the Court of Appeals of Kentucky in the case of Baltimore & Ohio Railroad Company, Appellant now Plaintiff in Error, against J. G. Leach Ap-

pellee now Defendant in Error as shown by the records on file in my office.

I, further certify that this is a copy of the said record ordered by the attorney for the Plaintiff in Error to be used upon an appeal from the judgment of the Court of Appeals of Kentucky to the Supreme Court of the United States.

In Testimony whereof witness my hand and seal of office. Done at Frankfort, Kentucky this the 7th day of February 1917.

[Seal Court of Appeals, Kentucky.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of the State of Kentucky.

Fee, $47.50.

153 Court of Appeals of Kentucky.

BALTIMORE & OHIO RAILROAD COMPANY, BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Appellants,

vs.

J. G. LEACH, Appellee.

Stipulation.

The appellants, Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company, by William W. Crawford, their counsel, and the appellee, J. G. Leach, by B. M. Lee, his counsel, hereby stipulate that the record filed with the appellants' petition for certiorari in the Supreme Court of the United States shall stand in this case as a return to the writ of certiorari issued by said Supreme Court and that the cause shall be heard upon this record in said Supreme Court.

(Signed) WILLIAM W. CRAWFORD,
Counsel for Appellants.
B. M. LEE,
Counsel for Appellee.

Endorsed: Filed May 7, 1917. Rodman W. Keenon, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Court of Appeals of Kentucky, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company, appellants vs. J. G. Leach, appellee, is a full, true and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certiorari attached thereto.

In testimony whereof, I hereto subscribe my name and affix the seal of the Court of Appeals for Kentucky at my office in the city of Frankfort, Kentucky, this seventh day of May A. D. 1917.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of the State of Kentucky.

154 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Being informed that there is now pending before you a suit in which Baltimore and Ohio Railroad Company and Baltimore and Ohio Southwestern Railroad Company are appellants and J. G. Leach is appellee which suit was removed into the said Court of Appeals by virtue of an appeal from the Circuit Court of Scott County, State of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States,

155 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Service of above writ accepted:
This 4th day of May, 1917.

B. M. LEE,
Attorney for Appellee.

[Endorsed:] File No. 25,768. Supreme Court of the United States. No. 938, October Term, 1916. Baltimore and Ohio Railroad Company et al. vs. J. G. Leach. Writ of Certiorari. Filed May 7th, 1917. Rodman W. Keenon, Clerk Court of Appeals of Kentucky.

156 [Endorsed:] File No. 25,768. Supreme Court U. S. October term, 1916. Term No. 938. Baltimore & Ohio R. R. Co., Petitioner, vs. J. G. Leach. Writ of certiorari and return. Filed May 16, 1917.

FILED
FEB 13 1917

No. 9384 [redacted] 132

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

BALTIMORE & OHIO RAILROAD COMPANY, BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONERS,

versus

J. G. LEACH, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO BE ISSUED TO THE COURT OF APPEALS OF KENTUCKY.

PETITION FOR CERTIORARI.
BRIEF ON PETITION.

CHARLES H. GIBSON,
WILLIAM W. CRAWFORD,
Counsel for Petitioners.

BRADLEY & BRADLEY,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

BALTIMORE & OHIO RAILROAD COMPANY,
BALTIMORE & OHIO SOUTHWESTERN RAILROAD
COMPANY, - - - - - - - - - *Petitioners,*

versus

J. G. LEACH, - - - - - - - - - *Respondent.*

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company respectfully show unto Your Honors:

That they are each respectively railroad corporations engaged as common carriers in the transportation of freight and passengers in interstate commerce, and as such interstate carriers receive freight for shipment in the State of Illinois for points in the State of Kentucky.

Petitioners say they are each such common carriers as are required by Section 8592 (*United States Compiled Statutes, 1913 Edition*), Act February 4, 1887, Chapter 104, Section 20, as amended by the Act June 29, 1906,

Chapter 3591, Section 7, Act February 25, 1909, Chapter 193 and Act June 18, 1910, Chapter 309, Section 14, relating to interstate and foreign commerce, to issue, as initial carriers a receipt or bill of lading for all property received by either of them in one State for shipment into another. That as such common carrier the Baltimore & Ohio Southwestern Railroad Company received from respondent, J. G. Leach, forty-one head of cattle at East St. Louis, Ill., for transportation by its line and that of its connecting carrier, the Cincinnati, New Orleans & Texas Pacific Railway Company, to Georgetown, Ky.

Upon receipt of the cattle, the Baltimore & Ohio Southwestern Railroad Company issued to respondent its bill of lading as initial carrier as required by Section 8592, Subsection 11, United States Compiled Statutes, of the Act above referred to.

After the cattle reached Georgetown and were delivered to Leach he brought this action in the Scott Circuit Court, in Kentucky, against the petitioner, Baltimore & Ohio Southwestern Railroad Company for alleged damages to the cattle resulting from alleged delay in transportation.

The answer of your petitioner claimed, among other things, that the bill of lading was issued to respondent under the terms of the above Act and contained the following provision:

> "No claim for damages which may accrue to said shipper under this contract shall be allowed or paid by said carrier or sued for in any court by said shipper unless a claim for such loss or damage shall be

> made **in writing** verified by the affidavit of the shipper or his agent and delivered to the **General Freight Agent of the said carrier at his office in Cincinnati, Ohio,** within five days from the time said stock is removed from said car or cars; and if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

And that no such claim **in writing,** verified by the affidavit of the shipper or in writing at all, was made within five days from the time the stock was removed from the cars either to respondent or to its connecting line.

This **claim was not controverted** but it was alleged in avoidance that the agent, at destination, of the connecting line had verbally waived the above-quoted provision of the bill of lading.

The Circuit Court held the provision could be waived, refused respondent's motion for a directed verdict and judgment was rendered against the Baltimore & Ohio Railroad Company for three hundred and seventy-two dollars.

The case was appealed to the Court of Appeals of Kentucky and affirmed without opinion. Upon petition for rehearing in which the court's attention was called to the decisions of this court in the case of

> Louisville & Nashville Railroad Company v. Croan & Griffin (*decided October 23, 1916*),

in which their judgment in a similar case had been reversed, and also the cases of

Northern Pacific R'y Co. v. Wall, 241 U. S. 87.
Cincinnati, New Orleans & Texas Pacific R'y Co. v. Rankin, 241 U. S. 319.
Georgia, Florida & Alabama R'y v. Blish Milling Co., 241 U. S. 190.

in addition to those cited in our original brief, the principle of which cases are directly contrary to the ruling here, the Court of Appeals of Kentucky held in response that the language of this court in the case of Georgia, Florida & Alabama R'y Co. v. Blish Milling Company and other cases—

> "is not sufficiently decisive nor near enough related to the question under consideration (*i. e., direct waiver*) here to be regarded as controlling it,"

and that until this court had directly held that the notice provision in an interstate bill of lading could not be waived, it would not change its own rules to the contrary announced in the cases of—

Howard & Callahan v. Illinois Central Railroad Co., 161 Ky. 783.
Cincinnati, New Orleans & Texas Pacific R'y v. Smith & Johnson, 165 Ky. 235.

In the response to the petition for rehearing the Court of Appeals of Kentucky concedes our contention that the question involved is a Federal one and controlled by the decisions of this court, and yet the rule announced is directly contrary to the plain purpose and intent of the Carmack Amendment to the Hepburn Act to regulate interstate commerce, and in our judgment directly contrary to the rulings of this court.

The court of Appeals of Kentucky is the highest court in said State wherein a judgment can be had in this case and its judgment herein rendered is final, unless reversed by this court.

Under Section 1214 of the Judicial Code as amended by the Act of December 23, 1914, Chapter 2, and the Act of September 6, 1916, Chapter 448, Section 2, the rights claimed by petitioner under the Federal acts which were denied it by the judgment below can apparently only be reviewed upon the granting of this court of a writ of *certiorari*, but as the question involved is a Federal one and has been decided in accordance with the State rule against the Federal rule, we think the matter is of sufficient importance to merit the granting of the writ of *certiorari* prayed for to the Court of Appeals of Kentucky.

Wherefore, your petitioners, Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company prays that a writ of *certiorari* issue out of and under the seal of this Honorable Court, directed to the Court of Appeals of Kentucky commanding the said court to certify to this Honorable Court, on a date certain to be therein designated, a full and complete transcript of the record of proceedings of said Court of Appeals in said case there entitled Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company, appellants, versus J. G. Leach, appellee, to the end that the said cause may be reviewed and determined by this Honorable Court; and that said petitioners may have such other and further relief in the premises

as to this court may seem proper and as the nature and circumstances of the case may require; and that said judgment and decree of the Court of Appeals of Kentucky in said cause may be reversed by this Honorable Court.

And your petitioners will ever so pray.

CHARLES H. GIBSON,
WILLIAM W. CRAWFORD,
Counsel for Petitioners.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON. } ss.

William W. Crawford, being duly sworn, says that he is counsel for the petitioners, Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company, and that he prepared the foregoing petition and the allegations contained therein are true as he verily believes.

WILLIAM W. CRAWFORD.

Subscribed and sworn to before me this 5th day of February, 1917. My commission expires January 29, 1920.

J. JOS. HETTINGER,
Notary Public, Jefferson County.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

BALTIMORE & OHIO RAILROAD COMPANY,
BALTIMORE & OHIO SOUTHWESTERN RAILROAD
COMPANY, - - - - - - - - - *Petitioners,*

versus

J. G. LEACH, - - - - - - - - - *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO BE ISSUED TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR PETITIONERS.

J. G. Leach recovered judgment against the Baltimore & Ohio Railroad Company in the Circuit Court of Scott County, Kentucky, for injuries to cattle which was received by the railroad at East St. Louis, Illinois, and delivered to Leach at Georgetown, Kentucky, by a connecting line.

The shipment was under a uniform livestock contract signed by both parties and filed in evidence in the record as "Exhibit No. 1."

Among other things it provides:

"No claim for damages which may accrue to said shipper under this contract shall be allowed or paid by said carrier or sued for in any court by said shipper unless a claim for such loss or damage shall be made **in writing** verified by the affidavit of the shipper or his agent and delivered to the **General Freight Agent of the said carrier at his office in Cincinnati, Ohio,** within five days from the time said stock is removed from said car or cars; and if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

Paragraph four of the answer of the railroad pleaded the failure of the respondent to give the notice required by the above-recited provision.

The allegations of this paragraph were not denied.

Respondent attempted to avoid the effect of his failure to comply with this provision of the bill of lading by pleading that the station agent at Georgetown, Ky., of the Cincinnati, New Orleans and Texas Pacific Railway Company, the delivering carrier, verbally waived the requirement of the notice clause.

This contention was sustained by the Circuit Court and upheld by the Court of Appeals of Kentucky on the authority of two cases theretofore decided by that court.

Howard and Callahan v. Illinois Central, 161 Ky. 783.

Cincinnati, New Orleans & Texas Pacific R'y v. Smith & Johnson, 165 Ky. 235.

If this matter were a Kentucky **intra**state contract we concede those cases are decisive against the position we take here.

However the Kentucky Court of Appeals concedes the Kentucky rule does not control.

In the response to the petition for rehearing it says:

> "The appellant, by its petition seeks a rehearing in this court upon its contention that the shipment was an **interstate** transaction and that the bill of lading contained the contract between the shipper and the appellant which was the initial carrier and that the meaning and construction of the contract is a Federal question, and the construction to be placed upon such a contract by the courts of Federal jurisdiction is controlling.
>
> **"The soundness of this contention is conceded."**

Again the court said:

> "The Federal statute, known as the Carmack Amendment to the Interstate Commerce Act was invoked and it was plead that the bill of lading was made and delivered to the shipper under the provisions of that statute: and further that the appellee did not within five days deliver a claim for damages in writing verified by his affidavit or that of his agent to the general freight agent of appellant at Cincinnati, Ohio, or to the connecting carrier, the Cincinnati, New Orleans & Texas Pacific Railway Co.
>
> **"These averments of answers were undenied."**

At singular variance with this statement the court says the bill of lading is not shown to be in accordance with the published tariffs.

In the absence of proof that the bill of lading did not conform to the published tariffs it will be presumed to

have done so. That question is settled by the case of Cincinnati & Texas Pacific R'y v. Rankin, 241 U. S. 319, 327, decided May 22, 1916.

It was pleaded and admitted that the Carmack Amendment to the Interstate Commerce Act (Sec. 7-C 3591, 34 Stat. 584, 593) required the petitioner to issue Leach a bill of lading and the Act otherwise required the publishing of tariffs.

By the Act of February, 1903 (*the Elkins Act*) amending the Act of 1887, 32 Stat. 847, it is made unlawful for a carrier to give or any person to accept any

"concession"

in respect of the transportation of any property in interstate or foreign commerce whereby any such property shall by any devise whatever be transported at a less rate than that named in the tariff or whereby

> "any other advantage is given or discrimination is practiced."

In **Northern Pacific R'y v. Wall**, 241 U. S. 87, 91, this court held the law was a part of every contract or bill of lading issued by the railroads. This merely followed the rule of the earlier case of **Chicago & Alton v. Kirby**, 225 U. S. 155.

It can not be denied that each provision of a contract is inserted for the benefit of one or the other party and is an essential element of the contract. Being such to waive any feature is an unlawful discrimination or consession under the Act.

In **Chesapeake & Ohio R'y Co. v. McLaughlin,** 242 U. S. 142 (*decided December 4, 1916*) the **identical provision of the uniform livestock contract** was under consideration and upheld and failure of the shipper to give the required notice was held fatal to his claim.

The point was considered so thoroughly settled that the Court of Appeals of Kentucky was reversed by this court in a *per curiam* opinion rendered October 23, 1916, which reads as follows:

> "No. 453, Louisville & Nashville Railroad Company, plaintiff in error, v. C. L. Croan, *et al.* In error to the Court of Appeals of the State of Kentucky, *per curiam;* judgment reversed with costs upon the authority of Northern Pacific Railway Co. v. Wall (241 U. S. 87); Cincinnati & Pacific R'y v. Rankin (241 U. S. 319)."

This provision of the contract under consideration being an important part thereof it can not be waived either by conduct or express agreement without the waiver amounting to the very discrimination denounced by the Federal Act.

That the Act applies to limitation questions was expressly held in the case of **Phillips v. Grand Trunk Railway,** 236 U. S. 662.

The court then held that there was the **affirmative** duty on the carrier of making every defense available saying:

> "Under such a statute the lapse of time not only bars the remedy but destroys the liability whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This

will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. The **obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law** and to **treat all shippers** alike would have made **it illegal** for the carriers, either by **silence** or **express waiver**, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent, judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer."

In the later case of **Georgia, Florida & Alabama R'y v. Blish Milling Company**, 241 U. S. 190, 197 (*decided May 8, 1916*), where conduct of the railroad company was made the basis of a claim against it for a different liability than that expressed in the bill of lading the court again said that the purpose of the Federal Act was to **close** the door against discrimination in whatever form it might be used.

At page 190 the court says:

> "It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not **waive** the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier **by its conduct give the shipper the right to ignore these terms** which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chi. & Alt. R. R. v. Kirby, 225 U. S. 153, 166; Kansas Southern R'y v. Carl, *supra;* A., T. & S. F. R'y v. Robinson, 233 U. S. 173, 181; Southern R'y v. Prescott, *supra.*"

In response to the language of this court there used, which was strongly pressed upon the Court of Appeals of Kentucky, that court, in overruling the petition for rehearing, said:

> "The effect of a direct waiver of such a condition was not before nor considered by the court. Hence there does not seem any justification for us to change the rule of this court relating to such question, and which has heretofore been declared and established, as the language used in the opinion is not sufficiently decisive nor near enough related to the question under consideration here to be regarded as controlling it."

The amount involved in this particular case is not large but the question is so constantly arising as to make it one of real importance.

For this reason we think the petitioner has the right to ask (*if his contention is correct as to what this court*

has decided) that this court say to the Kentucky Court of Appeals that the parties can not by their conduct change the terms of an interstate contract of carriage issued pursuant to their published tariffs.

On the other hand, if the Court of Appeals of Kentucky is right in holding the expressions in the Georgia, Florida & Alabama R'y v. Blish Milling Company opinion (*supra*) and in the case of Phillips v. Grand Trunk R'y are dicta, it is only proper that the carrier may know by the decision of this court that he may waive this provision of the bill of lading in a proper case without incurring the liability that results from the violation of the Federal statute.

We therefore ask that the court grant the writ of *certiorari* and lay down a rule for shippers and railroads that will be uniform in Kentucky and the other States.

Respectfully submitted,

CHARLES H. GIBSON,

WILLIAM W. CRAWFORD,

Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

BALTIMORE & OHIO RAILROAD COMPANY,
BALTIMORE & OHIO SOUTHWESTERN RAILROAD
COMPANY, - - - - - - - - - - *Petitioners,*

versus

J. G. LEACH, - - - - - - - - - - *Respondent.*

NOTICE.

To B. M. Lee, Counsel for J. G. Leach, respondent:

You are hereby notified that the petitioners, Baltimore & Ohio Railroad Company and Baltimore & Ohio Southwestern Railroad Company, will on Monday, February 19, 1917, or as soon thereafter as the motion can be heard, present to the Supreme Court of the United States the foregoing petition (*a copy of which petition and brief in support thereof is herewith served upon you*) and move the said court to grant the writ of *certiorari* as prayed for therein.

CHARLES H. GIBSON,
WILLIAM W. CRAWFORD,
Counsel for Petitioners.

NOV 18 1918
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 132.

BALTIMORE & OHIO RAILROAD COMPANY, BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONERS,

versus

J. G. LEACH, RESPONDENT.

BRIEF FOR PETITIONERS.

WILLIAM W. CRAWFORD,
Counsel for Petitioners.

ALEX. P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES G. MIDDLETON,
CHURCHILL HUMPHREY,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 132.

BALTIMORE & OHIO RAILROAD COMPANY,
BALTIMORE & OHIO SOUTHWESTERN RAILROAD
COMPANY, - - - - - - - *Petitioners,*

versus

J. G. LEACH, - - - - - - - *Respondent.*

BRIEF FOR PETITIONERS.

On Certiorari to the Court of Appeals of Kentucky.

STATEMENT OF CASE.

On October 1, 1914, J. G. Leach delivered to the Baltimore & Ohio Southwestern Railroad Company at East St. Louis, Ill., forty-one head of cattle to be transported to himself at Georgetown, Scott County, Ky.

The transaction was an interstate movement made under a bill of lading issued to Leach pursuant to Act of Congress, which bill of lading contained the following provision:

> "No claim for damages which may accrue to said shipper under this contract shall be allowed or paid by said carrier or sued for in any court by said shipper unless a claim for such loss or damage shall be

made in writing, verified by the affidavit of the shipper or his agent, and delivered to the General Freight Agent of said carrier at his office in Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars; and if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

The shipment was routed via Baltimore & Ohio Southwestern Railroad from East St. Louis, Ill., to Cincinnati, Ohio, and then via Cincinnati, New Orleans & Texas Pacific Railway to Georgetown, Ky.

(*For convenience, we shall hereafter refer to petitioners as the railroad and to Leach as the shipper.*)

When the car containing the shipment reached Georgetown, the shipper claimed that the stock was in bad condition and called the attention of Zach Meyers, the local agent of the C., N. O. & T. P. R'y Co. at Georgetown to its condition, and the following conversation occurred between them.

Leach testified as follows on direct examination (*Record, p. 54*):

"A. I counted them and found them short, and I went and looked up the agent, Mr. Meyers, and told him that my cattle was short three, and we counted them and I told him that I had a claim against the railroad for damages, **and that I was going to file claim against them.**

Q. What did he say?

A. He says all right.

Q. Did he say anything about requiring any further notice?

A. He said that is all that is necessary.

Q. What did Mr. Meyers say at that time as to whether there was any additional notice required?

A. He said for me to make out a claim as to the damages and write him a letter and a bill of lading and put it in the letter to him of the shipment and with what information he had here and the scale tickets, and what the cattle cost and told me to mail it to him through a letter."

On cross-examination he testified as follows (*Record, p. 58*):

"Q. I ask you, did you give any written notice to the general agent of the B. & O. R. R. Co. at Cincinnati within five days?

A. No, sir.

* * * * * * * *

Q. That notice (*Exhibit No. 4*) is the only notice of any kind that you gave the railroad company, isn't it?

A. The only one that I gave, only the one that I gave at the time that they arrived to Mr. Meyers.

Q. And that was simply an oral statement of the cattle damaged?

A. I stated that I had a claim, and he could see the condition of the cattle, **and he told me the steps to take.**"

That is all that Leach says on the subject.

Meyers testified that the following took place (*Record, p. 62*):

"Q. He told you, then, about the damaged condition of the cattle?

A. Yes, sir.

Q. And you told him about writing and making —getting the bill of lading and making out his claim?

A. He took—I told him he would have to get a

notice and an expense bill and a freight bill and also his bill for the amount of damages and file them."

On cross-examination (*Record, p. 63*):

"Q. And this letter which is filed here (*Exhibit No. 4*) was the only written notice of any kind ever presented to you?
A. Yes, sir."

In the court of first instance, the railroad company denied liability on the ground that no written notice was given, as required by the above provision of the bill of lading (*Record, p. 17*), and pleaded that the shipment was interstate; that, under the Act of Congress, it was required to issue to the shipper a bill of lading; and under the requirements of said Act, it issued to the shipper the bill of lading in question; and that said bill of lading contained, among other things, the clause hereinabove referred to; and further claimed that no notice was given as provided by said clause (*Record, pp. 16, 17*).

The plea was undenied.

(*See opinion Court of Appeals, Record, p. 69.*)

By an affirmative plea, the shipper claimed that the agent for the C., N. O. & T. P. R'y at destination waived the above provision of the bill of lading (*Record, p. 21*). These allegations were controverted of record by consent (*Record, p. 21*) and all the proof offered on the subject was that heretofore set out.

At the conclusion of the evidence, the railroad requested a directed verdict, which request was denied, and the jury found a verdict for $372.00 for the shipper, and

this verdict was affirmed by the Court of Appeals by an opinion set out on pages 68 to 78, inclusive, of the Record.

QUESTIONS INVOLVED.

The questions involved are:

(1) Whether the above-quoted provision of a bill of lading can be waived by an agent of the railroad.

(2) Was it so waived, as a matter of law.

THE ERRORS COMPLAINED OF.

The questions involved were raised in the court of first instance by the fourth paragraph of the answer of the railroad (*Record, pp. 15, 16, 17*) which was undenied (*see opinion Court of Appeals, Record, p. 69*); by a motion for directed judgment at the conclusion of plaintiff's testimony (*Record, p. 63*); and again at the conclusion of the whole case (*Record, p. 64*); by a motion for a new trial (*Record, p. 22*); and again in the Court of Appeals of Kentucky in the original brief and on petition for rehearing (*Record, p. 66*); and although the Federal question was recognized by the Court of Appeals as being involved (*Record, p. 68*), the decision by the Court of Appeals was against petitioner on the ground that it had decided otherwise in the case of Howard & Callahan v. Illinois Central Railroad Co., 161 Ky. 783 (*Record, pp. 71, 75*).

ARGUMENT.

In **Cincinnati, New Orleans & Texas Pacific Railway** v. **Rankin**, 241 U. S. 319, 326, this court said:

> "The State courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading and common-law rules as accepted and applied in Federal tribunals. Cleveland & St. Louis R'y v. Dettlebach, 239 U. S. 588; Southern Express Co. v. Byers, 240 U. S. 612, and cases cited; Southern Railway v. Prescott, 240 U. S. 632."

and further held that the interpretation and effect of a bill of lading of an interstate shipment presents a Federal question, even though there is no affirmative proof that the carrier has filed tariff schedules in compliance with the Act to Regulate Commerce.

In **Chesapeake & Ohio R'y Co.** v. **McLaughlin**, 242 U. S. 142, this court held that a stipulation identical with the one here presented was unobjectionable and that where the evidence failed to show that the shipper did comply with the terms of the provision, the trial court should have complied with a seasonable request for a directed verdict.

In **Erie R. R.** v. **Stone**, 244 U. S. 332, 335, the question was held to no longer be open to discussion.

The McLaughlin case was referred to with approval in **St. Louis, Iron Mountain & So. R'y** v. **Starbird**, 243 U. S. 592, 596, where the court further says:

> "Since the passage of the Carmack Amendment, the State Court must be held to have known that interstate shipments were covered by a uniform Federal rule which required the issuance of a bill of lading, and that that bill of lading contained the entire contract upon which the responsibilities of the parties rested." (*Page 597.*)

That case arose over failure of the consignee to notify the railroad in writing within thirty-six hours after the notice of the arrival of the shipment had been given him of his claim for damage. The lower court held that actual notice of the railroad agent of the damaged condition of the shipment (*peaches*) was sufficient, but this court, in reversing, said (*p. 606*):

> "We find nothing unreasonable in the stipulation concerning notice and there was no attempt made to comply with it. We therefore think the Supreme Court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract."

The Court of Appeals of Kentucky, in the case at bar, in denying the railroad's claim that the failure of the shipper to give the required notice was fatal to his claim; that no waiver could be made by an agent of the railroad; that no waiver was actually made, fully recognized that the question was a Federal, and not a State, one, saying:

> "The appellant, by its petition, seeks a rehearing in this court upon its contention that the shipment was an interstate transaction, and that the bill of lading contained the contract between the shipper and the appellant, which was the initial carrier, and that the meaning and construction of the contract is

> a Federal question and the construction to be placed upon such a contract by the courts of Federal jurisdiction is controlling. **The soundness of this contention is conceded.**" (*Record, p. 68.*)

The same court, in the case of **Howard & Callahan** v. **I. C. R. R. Co.**, 161 Ky. 783, 789, recognized and conceded the validity of the limitation as to notice of claim for damage in a bill of lading, but held the agent at destination might waive such a provision.

In the later case of C., N. O. & T. P. v. Smith and Johnston, 165 Ky. 235, the same ruling was made.

In the case at bar the Kentucky Court of Appeals does not question the validity of the clause of the bill of lading under consideration, but upholds the contention that the provision may be waived by the agent of the railroad, saying in that connection:

> "Under these opinions (*161 Ky. 783, 165 Ky. 235*) there appears to be no reason why we should depart from the doctrine there held, until it shall be determined by the Federal tribunals, that the condition in a contract for interstate shipment of goods, that requires notice to be given within a specified time, as a condition precedent to a right of recovery, can not be waived by the carrier."

Reviewing certain decisions of this court, and particularly speaking with reference to the opinion in **Georgia, Florida & Alabama R'y Co.** v. **Blish Milling Co.**, 241 U. S. 190, the court says:

> "The effect of a direct waiver of such a condition by the party in interest and by his agreement was not before, nor considered by the court. Hence, there does not seem any justification for us to change

> the rule of this court relating to such question, and which has heretofore been declared and established, as the language used in the opinion is not sufficiently decisive nor near enough related to the question under consideration here to be regarded as controlling it."

The language there referred to by the Court of Appeals is the following from the opinion in the Blish Milling Co. case, *supra*, at page 197:

> "It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chi. & Alt. R. R. v. Kirby, 225 U. S. 153, 166; Kansas Southern R'y v. Carl, *supra;* A. T. & S. F. R'y v. Robinson, 233 U. S. 173, 181; Southern R'y v. Prescott, *supra.*"

In **Railroad Companies** v. **Schutte**, 103 U. S. 118, 143, this court said:

> "It can not be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of

> the judgment of the court as was that on any other of the several matters on which the case, as a whole, depended."

Analysis of the case of the Blish Milling Company, as presented to this court, would seem to demonstrate that the opinion there is both "*sufficiently decisive and near enough related to the question under consideration to be regarded as controlling;*" and that the opinion is not open to the criticism of being a dictum in so far as the case at bar is concerned.

The brief of counsel for the milling company, at the outset of the argument, challenged the authority of this court to review that case upon the ground that the decision of the lower court was not based upon a Federal question, and cited in support of that contention Arkansas Southern Railway Co. v. German National Bank, 207 U. S. 270. If the position taken by the Georgia Court of Appeals, to-wit, that, by their conduct, both the railroad and shipper could abandon the original bill of lading (*which the court found, as a matter of fact, they had done*), was correct, the decision below was not, in point of fact, one reviewable in this court because it did not arise under the terms of an interstate bill of lading. To hear and determine the cause, therefore, it was first necessary for this court to hold that the finding of fact of the Georgia Court could not be controlling because, as a matter of law, the bill of lading issued by the initial carrier was controlling on the rights of all parties at all time up to and including final delivery, and therefore could not be waived. For this reason, the court devoted the

first part of its opinion to the determination of the correctness of the proposition that the decision in the case was controlled by the bill of lading, and not by the acts of the parties independent thereof. This was not only necessary to sustain the jurisdiction of this court, which it would not otherwise have had, but was necessary to prevent the opinion of the lower court to the effect that the liabilities and rights of the parties arose out of facts independent of the bill, being promulgated as a correct exposition of law. We think, therefore, that it must be conceded that the quoted part of the Blish Milling Company decision can not properly be classed as dicta, but as part of the *ratio decedendi*, and is controlling upon the lower courts.

But whether the language of the court in the Blish Milling case be "considered as decisive or near enough related to be controlling" is inconsequential in view of the ruling of this court in **Missouri, Kansas & Texas R. R. v. Ward,** 244 U. S. 383, 388, which places beyond question the position of this court on the point here considered.

A shipment was delivered by Ward to the Houston & Texas Central Railway at Llano, Texas, for transportation to Elgin, Texas, thence over connecting lines to Winona, Okla. The Houston line issued a through bill of lading. When the shipment reached Elgin, a second bill of lading for the transportation from that point on was executed by an agent of the shipper, and by the Missouri, Kansas & Texas Railroad. The shipment reached destination in a damaged condition, and the shipper made claim for damages against the delivering carrier. The

railroad company made defense on the ground that no notice of damage was given it as required by a provision in the bill of lading issued to the shipper's agents at Elgin. In avoidance of this, the shipper claimed that the entire contract of shipment was covered by the bill of lading issued by the original carrier; that the act of his agent and the railroad in accepting and issuing a second bill of lading was ineffective and void, as the original bill of lading covered the entire contract between the parties.

Two questions were considered.

The first was: "Were the terms of the original bill of lading effective as binding not only the original, but subsequent carriers?" That question was answered in the affirmative.

The second question was the exact contention made here, viz.: "Was the giving and accepting of a second bill of lading effective as a waiver of the rights of the parties arising under the first?" and in answering that in the negative, this court said:

> "The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore as stated in Georgia, Florida & Alabama R'y Co. v. Blish Milling Co., 241 U. S. 190, 197, 'the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act. * * * A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed.'"

Independent of these two decisions affecting a clause identical to the one in controversy, the language of the Blish Milling Company case is clearly a correct statement of the law.

The purpose of the Commerce Act was thus stated in **Chicago & Alton** v. **Kirby**, 225 U. S. 155, 166:

> "The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given a particular shipper as that contracted for by defendant in error."

The service there contracted for was that the horses should go by a special train and make a certain connection.

But the special contract or concession need not precede the shipment, or precede the delivery, in order for the prohibition of the Act to apply for it, for it applies all through the transaction, even up to the making of and recognition of claims for damage, as is established by this court in **Phillips** v. **Grand Trunk Railway**, 236 U. S. 662.

The A. J. Phillips Company was a Michigan manufacturer. The rate on lumber to Fenton from certain points was raised two cents a hundred by certain carriers. After this raise, the Yellow Pine Association complained to the Interstate Commerce Commission of the unreasonableness of this increased rate. The Interstate Commerce Commission held that the increased rate was unreasonable and unjust and ordered a lowering of the rate. The carriers

sought to have this order enjoined, but the action of the Commission was sustained by the Circuit Court and affirmed by this court. The Commission then approved the settlement of a number of claims for reparation which had been previously filed. The Phillips Company was not a party to the proceeding before the Commission and made no claim for reparation until after two years from the date on which the rate was declared to be unreasonable. The Phillips Company, relying on the finding of the Commission, brought suit to recover that portion of the rate which it had paid, and which had been declared to be unreasonable.

The court, in holding that it was the duty of the carrier to make every defense available, including the defense of limitation, said:

> "Under such a statute the lapse of time not only bars the remedy, but destroys the liability whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. **The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period.** To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; **or to permit a railroad company to plead the statute of limitations as against some and to waive it as against**

> **others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished.** The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also **to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier.** The railroad company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer."

Here it was pleaded (*Record, p. 16*) and admitted (*Record, p. 69*) that the Carmack Amendment to the Interstate Commerce Act (*Sec. 7-C 3591, 34 Stat. 584, 593*) required the petitioner to issue Leach the bill of lading which became the contract between the parties and which bill contained the clause which it is pleaded an employe of a connecting carrier waived.

By the Act of February, 1903 (*the Elkins Act*) amending the Act of 1887, 32 Stat. 847, it is made unlawful for a carrier to give or any person to accept any

"concession"

in respect to the transportation of any property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariff, or whereby—

> "any other advantage is given or discrimination is practiced."

The case just cited construes this to prevent the carrier by—

"silence or express waiver"

from preserving the rights which the shipper otherwise has lost, and as clearly as language can, holds that—

> "the prohibition of the statute against unjust discrimination relates not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or waiver of defenses open to the carrier."

The very purpose of the Act was to have the measure of all rights and liabilities of both carrier and shipper determined by the contract entered into in the initial bill of lading, and prevent the opening of the door to favoritism or abuse by the allowance of any written or verbal waiver of its terms by any subsequent act of the parties.

The fallacy of the State Court's ruling lies in the fundamental error of assuming that a contract between an interstate carrier and a shipper in no respect differs from a contract between any two individuals. (*See its reference to Hutchison on Carriers, 161 Ky. 789.*)

Such a position is in direct variance with the purpose of the Interstate Act. The Act was passed to place railroad contracts outside of the power of agents and employers to alter or change or waive after they had once been made by the initial carrier. As said in **Southern Railway v. Prescott,** 240 U. S. 639:

> "It is also clear that with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by filed regulations."

Again:

> "This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discrimination."

When the initial carrier issued its bill of lading, it had the right to assume that its liability was measured and limited by the terms of that bill, and the very presence of clauses therein affecting notices, in the event of claims for loss, demonstrated that the provisions were important parts of the contract of carriage and governed by the terms of the Federal law. That being true, they bound the shipper and carrier alike and could not be waived either by conduct or express agreement.

THERE WAS NO WAIVER OF THE NOTICE CLAUSE.

There is no disputed fact as to waiver in this case—the case presents simply and solely a matter of legal construction as to the effect of certain acts.

The question of whether there is any evidence of waiver under the terms of an interstate bill of lading is essentially Federal.

> St. Louis, Iron Mt. & Sou. R'y v. Starbird, 243 U. S. 592, 601.

The plaintiff pleaded that the carrier waived the notice clause of the provision (*Record, p. 20*). This pleading was controverted by the carrier (*Record, p. 21*). The facts proven were undisputed and are recited at pages 2 and 3, brief.

The Court of Appeals held that the facts set out as to what happened regarding notice was sufficient evidence in support of the shipper's claim of waiver to take that question to the jury. But the question was not a jury one. Where the facts are admitted, the question is one for the court. Here the facts were admitted.

Leach testified (*Record, p. 54*):

> "A. I counted them and found them short and I went and looked up the agent, Mr. Meyers, and told him that my cattle was short three and we counted them and I told him I had a claim against the railroad for damages and that I was going to file a claim against them.
>
> Q. What did he say?
>
> A. He says all right.
>
> Q. Did he say anything about requiring any further notice?
>
> A. He said that is all that is necessary.
>
> Q. What did Mr. Meyers say at that time as to whether there was any additional notice required?
>
> A. He said for me to **make out a claim as to damages and write him a letter** and a bill of lading and put it in the letter to him of the shipment and with what information he had here of the scale tickets and what the cattle cost and told me to mail it to him through a letter."

Leach's evidence showed him to be an experienced shipper and he must have known the contents of his contract. Whether he did or not, he was charged with such knowledge.

Instead of waiving the necessity of a claim as required by the bill according to Leach's own testimony, the agent told him to file one, and nothing whatever was said about the time in which one was to be filed. It would certainly

be a stretch of the reasonable meaning of words to construe the language Leach testifies Meyers employed to hold that, saying—

> "make out a claim for damage and write me a letter, etc.."

means that the railroad intended to waive the requirements of the contract. No such intention is either shown or was present.

Such being true, there was no waiver shown, even were it legal for an agent of the company to make such a concession in violation of the evident intent of the Interstate Commerce Act.

For the reasons above set out, I respectfully ask the court to sustain the petition and reverse the judgment of the Court of Appeals of Kentucky.

WILLIAM W. CRAWFORD,
Counsel for Petitioner.

ALEX. P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES G. MIDDLETON,
CHURCHILL HUMPHREY,
Of Counsel.

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JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 132.

BALTIMORE & OHIO RAILROAD COMPANY,
PETITIONER,

VERSUS

J. G. LEACH, RESPONDENT.

REPLY BRIEF FOR PETITIONER.

WILLIAM W. CRAWFORD,
Counsel for Petitioner.

ALEXANDER P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES G. MIDDLETON,
CHURCHILL HUMPHREY,
Of Counsel.

WESTERFIELD-BOHTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 132.

BALTIMORE & OHIO RAILROAD COMPANY, - - *Petitioner,*

versus

J. G. LEACH, - - - - - - - - - *Respondent.*

REPLY BRIEF FOR PETITIONER.

I.

The brief of counsel for J. G. Leach is largely taken up by an advancement of the claim that no bill of lading was issued to Leach at the time of shipment, and that, therefore, the stipulations of the bill of lading can not control this case.

This argument is based on an excerpt from the testimony of Leach found at page 54 of the Record. This testimony was incidental to the question as to whether Leach had given a notice, and in no way addressed to the inquiry as to the issuance or non-issuance of a bill of lading at the time the shipment was received by the initial carrier.

That question was in no way involved at the trial because concluded by the condition of the pleadings

Section 126 of the Civil Code of Practice of Kentucky provides as follows:

"Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed, excepting these, which must be proved, though not traversed:

"(1) Allegations of a petition, or cross-petition, against a defendant who is under any disability except coverture.

"(2) Allegations of an answer, or reply, so far as it states a set-off or counter-claim against a new party who is under any disability except coverture.

"(3) Allegations against a defendant constructively summoned, who has not appeared in the action.

"(4) Allegations concerning value or amount of damage not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise, to pay such value or damage; such allegations, so accompanied, need not be proved unless traversed."

The fourth paragraph of the answer of the Railroad Company (*Record, p. 16*) stated:

"They say that under said act of Congress these defendants are required to issue every shipper of an interstate shipment a bill of lading or contract containing all of the terms governing said shipment, and they say that the said Baltimore & Ohio Railroad Company did deliver to the said shipper, the plaintiff herein, a contract or bill of lading signed by the plaintiff and defendant Baltimore & Ohio Railroad Company, which contains all of the terms and stipulations of said contract of shipment, a copy of which is filed herewith. They say that one of the terms of said contract is as follows:

"(*Here follow terms of stipulation relied on.*)"

The reply to this answer may be found on page 20 of the Record, and it will be seen that said reply in no way controverts the allegations just referred to.

There was, accordingly, no issue at the time of the trial upon which any proof was relevant, concerning the issuance of a bill of lading.

The following excerpt from the opinion of the Court of Appeals demonstrates the correctness of this position (*Record, p. 69*):

> "The Federal statute, known as the Carmack Amendment, to the Interstate Commerce Act, was invoked and it was plead that the bill of lading was made and delivered to the shipper, under the provisions of that statute; and further, that the appellee did not within five days deliver a claim for damages in writing, verified by his affidavit or that of his agent, to the general freight agent of appellant at Cincinnati, Ohio, or to the connecting carrier, the Cincinnati, New Orleans & Texas Pacific Railway Company. These averments of answer were undenied, but, instead, the appellee replied in avoidance of them," etc.

The Carmack Amendment provides as follows:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor;"

and, although there was no question made upon the subject, the proof shows that such receipt or bill of lading was issued and signed by both the carriers and the shipper.

By referring to page 56 of the Record, it will be found that at the trial the original bill of lading, which was signed not only by the carriers, but by the shipper, Leach, himself, was produced, exhibited to Leach and identified by him as the one he signed.

"Q. I show you—is that the original contract shipment between you and the B. & O. with the B. & O.?

A. That looks like it.

Q. That is your signature.

A. It looks like it might be mine, there is a part of it torn off.

Q. That is the original I believe—that is your signature?

A. I suppose so, when I wrote them they sent me the contract—

Q. That is your signature?

A. I didn't sign but one contract, one (one) shipment, yes, sir; that is the one they are supposed to hold."

Thus the question made in respondent's first point is beside the case both by reason of the actual fact and the pleadings in this case.

II.

Point 2 of respondent's brief is devoted to a commendation of the argument of Judge Hurt denying our contention, as evidenced in the opinion in this case, and, in fact, a submission of the respondent's case upon the strength of Judge Hurt's opinion.

In this connection it may be interesting to note that on December 10, 1918, in the case of **L. & N. v. Ben Johnson and A. B. Wells**, reported in 182 Ky. 418, the Court of Appeals of Kentucky overruled (*though not in terms*) the case now before this Court, together with the cases of Howard & Callahan v. I. C., 161 Ky. 783, and C. N. O. & T. P. R'y v. Smith & Johnston, 165 Ky. 235, saying:

"The next question to be determined is, may the notice provision be waived? Heretofore we have been inclined to answer this question in the affirmative. Howard & Callahan v. I. C. R. R. Co., 161 Ky. 783, 171 S. W. 442; C. N. O. & T. P. R. Co. v. Smith & Johnston, 165 Ky. 235, 159 S. W. 987; B. & O. R. Co. v. Leach, 173 Ky. 452, 191 S. W. 310. Indeed, we construed the case of Georgia F. & A. Railway Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948, as not being decisive. B. & O. R. Co. v. Leach, **supra.** Other courts, however, have taken a different view of the scope and effect of that decision and have held it conclusive of the question. Wall v. Northern Pac. R. Co. (Mont.), 161 Pac. 518, L. R. A. 1917c; Banaka v. Mo. Pac. R. Co., 193 Mo. App. 345, 186 S. W. 7; Kemper v. Mo. P. R. Co., 193 Mo. App. 466, 186 S. W. 8; Donoho v. Mo. P. R. Co., 193 Mo. App. 610; 184 S. W. 1149. The same interpretation was given to that opinion by the U. S. Supreme Court in the case of Mo. K. & T. R. Co. v. Ward, 244 U. S. 383, 61 L. Ed. 1213, wherein it said:

" 'The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 197, 60 L. Ed. 948, 952, 36 Sup. Ct. Rep. 541, the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act. * * * A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.' "

And in ordering a reversal, issued the following directions:

"Since the required notice was a condition precedent to the right of recovery and such notice was not

given and could not be waived, it follows that the trial court should have directed a verdict in favor of the defendant."

We therefore ask that the case be reversed.

Respectfully submitted,

WILLIAM W. CRAWFORD,
Counsel for Petitioners.

ALEXANDER P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES G. MIDDLETON,
CHURCHILL HUMPHREY,
Of Counsel.

Supreme Court of the United States.

October Term, 1918.

No. 132.

B. & O. R. R. Co., *et al.*, *Petitioners*,

vs.

J. G. LEACH, *Respondent*.

BRIEF FOR RESPONDENT.

The respondent, J. G. Leach, brought suit 22d January, 1915, against the petitioner in the Circuit Court of Scott County, Kentucky, for neglect in transporting forty-one head of cattle from East St. Louis, Ill., to Georgetown, Ky. Upon trial, the jury found for the plaintiff in the sum of $372 against the B. & O. R. R. Co. A motion for a new trial was overruled; judgment was entered, and a bill of exceptions allowed. Upon appeal, the Court of Appeals of Kentucky affirmed the judgment.

The testimony shows that the cattle reached Cincinnati in an "exhausted condition, and worn out; weak. Three were down and one dead" (Rec., 29). The only defence submitted was that the bill of lading contained a provision that no claim for damages occurring under the contract

with Leach should be allowed unless a claim for loss or damage be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the railroad in Cincinnati within five days from the time the stock is removed from the car or cars (Rec., 16, 17).

The respondent, Leach, testified that on October 6th, when the stock arrived, he went to the pen, counted the cattle and found them short three; "we looked up the agent, Mr. Meyers, and told him that my cattle was short three; and we counted them and I told him that I had a claim against the railroad for damages, and that I was going to file claim against them" (Rec., 54).

Mr. Leach it appears did not have a bill of lading.

> "Q. Did you have a bill of lading at that time?
>
> A. No, sir; when I shipped these cattle out of St. Louis the B. & O. man—this bill—lading he usually give to me.
>
> (Objection by counsel for defendant to witness stating what the custom is; objection sustained.)
>
> Well, I went off and left there and had to write there for it. He didn't hand it to me and went on out of the office without it, and I wrote the men of the firm that I bought the cattle from and to get me a bill lading and mail it to me as soon as possible, and they didn't send it and I wrote the second time—my letter must have been misplaced or something—and about the 14th, 15th or 16th they wrote me—mailed me a bill lading back and I attended to the matter as I have said" (Rec., 55).

It is proved, therefore, that no bill of lading was issued to Mr. Leach at the time he had his stock shipped. Several days elapsed after the injury had been inflicted before the shipper received a bill of lading. He had to write for such

a bill to be sent to him; and it is a fair presumption that it was not until its receipt that he became aware that the condition in regard to filing a claim for damages was contained in it.

Not a word can be found in the testimony to contradict the statement made by Mr. Leach. Nowhere do the defendants attempt to prove a delivery of the bill of lading to Mr. Leach at the time of shipment. In their answer (Rec., 16) they do not aver that a bill of lading was issued to Mr. Leach at that time. All that they do aver is that the railroad "did deliver to the said shipper, the plaintiff herein, a contract or bill of lading signed by the plaintiff and defendant, etc." (Rec., 16).

Had it been the fact that a bill of lading was handed to Mr. Leach at the time the shipment was made, the counsel for the railroad company would have seen to it that an averment to that effect was inserted in the pleadings; and would have brought one or more witnesses to the stand for the purpose of sustaining that averment.

The defendants' witness, Mr. Myers, agent for the railroad at Georgetown, Ky., testifies in regard to his advice to Mr. Leach: "I told him he would have to get a notice and expense bill and a freight bill, and also his bill for the amount of damages and file them" (Rec., 62).

The Court of Appeals of Kentucky, in their opinion overruling the railroad's petition for rehearing, say "The answer of the appellant does not show that the bill of lading in the instant case was issued in accordance to or under the published tariffs or regulations of appellant. There is no direct averment nor proof that the bill of lading was issued in compliance to the provisions of the Interstate Commerce Act" (Rec., 70).

We are therefore amply sustained in our position that the case shows that no bill of lading was issued to the shipper at the time that the stock was taken on board of the car.

POINTS OF LAW.

I

THE DEFENSE THAT THE OWNER OF THE CATTLE DID NOT COMPLY WITH THE CONDITION OF THE BILL OF LADING BY FILING A CLAIM IN WRITING WITHIN FIVE DAYS OF THE TIME THE STOCK WAS REMOVED FROM THE CAR HAS NO MERIT—FOR THE REASON THAT A BILL OF LADING WAS NOT ISSUED TO HIM UNTIL AFTER THE INJURY HAD BEEN INFLICTED, AND THE CATTLE TAKEN FROM THE CAR.

The object of requiring a shipper who complains of loss or damage to file a claim in writing, supported by affidavit, within five days after his cattle are removed from the car, is plain enough. The railroad has a right to be notified seasonably, so as to look into the facts as soon as possible after the occurrence of an alleged loss. This object was attained by the communication made by Mr. Leach to the railroad agent, Mr. Myers. The railroad was promptly advised that the cattle had not been properly treated.

We are not claiming that verbal notice will suffice, where by the terms of a contract written notice and affidavit are demanded. We are only contending that in the case at bar, the condition as to filing a claim could not be put in force against the shipper, for the reason that the existence of such a condition had not been brought home to him at the time his cattle were put on board the car. It is not enough that the substance of the contract be communicated to the shipper. The Act in explicit terms makes it the duty of the carrier to "issue" a bill of lading. The terms of the contract must be reduced to writing, and a receipt or bill, setting forth these terms, must be put into the hands of the owner of property to be transported. No notice of a character such as is set up by the defendant can be relied upon unless the requirement of the statute is strictly complied with. So reasonable is this position that there is no

need of citing authority. The requirement as to issuing a bill of lading is contained in what is known as the Carmack Amendment. It is to be found in full in the report of *Atlantic Coast Line v. Riverside Mills*, 219 U. S., 195.

The opening language is as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor."
>
> (34 U. S. Stat., 595.)

II

ASSUMING THAT THE REQUIREMENT IN THE BILL OF LADING FOR MAINTAINING A SUIT WAS BINDING ON THE SHIPPER, IT WAS WAIVED BY THE AGENT OF THE RAILROAD.

While we feel confident that the failure of the B. & O. R. R. to issue a bill of lading to Mr. Leach at the time of shipment disposes of this case, we deem it our duty to pay a measure of attention to the elaborate argument of the petitioners that the condition as to bringing suit could not be waived. This duty is the more readily admitted when the opinion of the Kentucky Court of Appeals is seen to be largely devoted to an examination of the question of waiver. That Court passes upon several announcements of the Supreme Court of the United States, interpreting the Interstate Commerce Acts, and concludes that there was a waiver (Rec., 68-75).

We need not repeat what has been so cogently presented in Judge Hurt's opinion. The examination of the decisions of this Court extends down as late as December, 1916, *Chesapeake & Ohio Ry. Co. v. McDaughlin*, 242 U. S., 142.

The fact is worth noting that in the *Blish v. Miller* case,

241 U. S., 190, the time allowed for filing claim for loss or damage is four months, as contrasted with five days in the case at bar. To be sure it was flour that was carried. The transportation of cattle may justify the fixing of a shorter period, but a limit of five days is certainly unreasonable. In the *Blish* case Mr. Justice Hughes aptly observes: "The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation." To require a shipper, or his agent, to furnish an affidavit within five days suggests a hope of escaping liability.

The question of what may be considered as reasonable notice of a claim for loss or damage has recently been made the subject of legislation by the Congress. We quote from the Act of March 4, 1915, as follows:

> "It shall be unlawful for any common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (38 U. S. Stat., 1197.)

Of decisions by this Court rendered later than December, 1916, and relied upon by petitioners, we may remark that in *Missouri, K. & T. Ry. Co. v. Ward*, 244 U. S., 283, the Court found that the record disclosed no evidence of intention to make a waiver.

There is really nothing in the reasoning put forward that waiving the requirement of a bill of lading cannot be sus-

tained because a railroad may thus favor one shipper and not another, and so defeat the purpose of legislation, which is to treat everybody alike. It might just as well be contended that in a jury trial against a railroad company, the defendant's counsel who would readily concede this or that fact should be prohibited from so doing, because in defending suits the railroad company might favor one plaintiff, and not another.

When Mr. Leach promptly told Mr. Myers, agent for the railroad, that having sustained a loss he wanted to make out a claim, Mr. Myers' reply contained nothing in the shape of a favor granted by the railroad. The rigid requirement of an immediate presentation of facts sworn to—a device to discourage suits—is done away with by the action of the shipper in informing the railroad that he had sustained a loss, and was going to make a claim. Such speedy action on the part of the shipper accomplishes everything that the terms of the bill of lading aimed to bring about. To pretend that a Court in holding a railroad bound by the act of its agent in receiving information in this manner is thereby affording the railroads of the country an opportunity to favor some of its shippers at the expense of the public, is a novel doctrine that will hardly bear criticism.

We repeat then that there is an entire absence of proof that the petitioner was bound by the condition as to bringing suit set forth in the bill of lading. We therefore respectfully ask that the judgment of the Court of Appeals of the Court of Kentucky be affirmed.

FRANK W. HACKETT,
For Respondent.

B. M. LEE,
JOHN S. BLAIR,
Of Counsel.

BALTIMORE & OHIO RAILROAD COMPANY ET AL. *v.* LEACH.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 132. Argued January 15, 16, 1919.—Decided March 10, 1919.

A stipulation in an interstate bill of lading conditioning the shipper's right to recover for loss or damage to live stock upon delivery of a verified claim in writing to a designated agent of the carrier within five days from the removal of the stock from the cars, *held* valid; and not waived; and not substituted by oral notice of the facts to the connecting carrier's agent. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592.

173 Kentucky, 452, reversed.

THE case is stated in the opinion.

Mr. William W. Crawford, with whom *Mr. Alex. P. Humphrey*, *Mr. Edward P. Humphrey*, *Mr. Charles G. Middleton* and *Mr. Churchill Humphrey* were on the briefs, for petitioners.

Mr. Frank W. Hackett, with whom *Mr. B. M. Lee* and *Mr. John S. Blair* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Respondent Leach sued the petitioners for damages sustained en route by cattle delivered at East St. Louis,

Illinois, October 1, 1914, for shipment to Georgetown, Kentucky. In defense the carriers set up non-compliance with the following provision contained in bill of lading issued as required by act of Congress: "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for loss or damages shall be made in writing verified by the affidavit of the shipper or his agent, and delivered to the General Freight Agent of said carrier at his office in Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." This averment was not denied; but the shipper replied that he promptly advised the railroad's agent at Georgetown of all essential facts and maintained that requirement in respect of written notice to general freight agent had been waived.

The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted. *St. Louis, Iron Mt. & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592; *Southern Pacific Co.* v. *Stewart*, 248 U. S. 446.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE CLARKE dissenting.

In this case the shipper sued two connecting interstate

carriers for damages to a carload of cattle, caused by delay in transit. Three died in the car and four more within three or four days of arrival at destination and the defense sustained by the court is failure to notify the carrier of claim for damages within five days of unloading.

The carrier pleaded that one of the terms of the bill of lading was the five-day limitation, quoted in the opinion of the court. This was immediately preceded, in the same paragraph, by the following:

"That in the event of any unusual delay or detention of said live stock caused by the negligence of said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept, as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said live stock while so detained."

In *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, a provision in exactly these terms was held "illegal and consequently void," as an attempt by the carrier to exonerate itself from loss negligently caused by it. This is the only provision in the bill of lading, as pleaded, which is applicable to a claim for delay, such as the shipper made in this case, and since it is void there is nothing in the contract for carriage on which the five-day limitation could operate, for it applied in terms only to claims "for damages which may accrue to the said shipper *under this contract.*"

The suit of the shipper was based on the common-law liability of the carrier,—not at all on the bill of lading; the five-day limitation is in terms applicable only to claims under the bill of lading; the only provision in the bill of lading applicable to claims for delay was void, and therefore it seems very clear that the five-day limitation was not available as a defense.

Permit me to add that the many cases coming into this

and other courts show that this five-day limitation is unreasonably short and in my judgment, for this reason, it should be declared void upon its face. Certainly it should not be made a favorite of the law and extended beyond its strict terms, in presence of the Act of Congress, approved March 4, 1915, c. 176, 38 Stat. 1196, declaring that where in such suit the "damage or injury complained of was due to delay . . . or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." While the case before us arose prior to the passing of this act, it is an important declaration of public policy by Congress, which should not be overlooked.

For the reasons thus briefly stated, I cannot concur in the opinion of the court.

MR. JUSTICE MCKENNA also dissents.